Supreme Court, U. S.
FILED
JAN 27 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1061

MAXWELL DARKS,
Appellant,

VERSUS

TRANSOK PIPELINE COMPANY,
an Oklahoma Corporation,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OKLAHOMA

JURISDICTIONAL STATEMENT

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January, 1978

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In the
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No. ----------

MAXWELL DARKS,
Appellant,

VERSUS

TRANSOK PIPELINE COMPANY,
an Oklahoma Corporation,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OKLAHOMA

JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

Interlocutory orders of the trial court, prior to the Final Orders of November 21, 1974, along with related orders from other cases, will be described and discussed in the Statement of the Case.

Order Appealed

The Final Order of the Supreme Court of Oklahoma of November 16, 1977, is herein appealed.

The trial court entered its Final Orders of November 21, 1974, which form the basis for this appeal. Said Orders overruled the Motion to Dismiss filed by Appellant on May 29, 1973. The Motion to Dismiss attacked the lack of due process requirements of 66 O.S. § 53 and failure of the

court to conduct a timely evidentiary hearing on the necessity and method for the taking in condemnation, prior to such taking. The Final Orders of November 21, 1974, also overruled request for temporary restraining order and injunction, overruled request to set aside Commissioners Report, and overruled request to allow Appellant to participate as a joint owner in the underground gas storage warehouse; all of the foregoing without a timely or untimely evidentiary hearing. Other matters hereinafter discussed in the Statement of the Case are also appealed herein. (App. B, p. 9)

The Appeal

The three condemnation cases appealed herein were consolidated by the Supreme Court of Oklahoma as No. 48,054 (S.Ct.) inasmuch as the issues were identical in the companion cases. The record and transcript (with exhibits) in No. 48,054 (S.Ct.) were the only record reviewed by the Court. On September 8, 1975, the Supreme Court of Oklahoma ruled that the separate trespass actions hereinafter described must be litigated in these condemnation actions. (App. C, p. 8)

The Supreme Court of Oklahoma assigned these cases to the Court of Appeals (Division 1) which rendered a decision on August 3, 1976, reversing and remanding the cases to the District Court and ordering a hearing, after notice to Appellant, on the Necessity and Method of the Taking and ordering a hearing on Exceptions to Commissioners Report. The Decision further indicating that trespass damages, prior to time of authorized entry in condemnation, would also be heard in the condemnation actions. (App. B, p. 11)

Appellant filed a Petition for Rehearing on August 18, 1976, alleging that the condemnation cases should be dismissed with prejudice with the trespass actions to be remanded to the District Court for jury trial on the question of damages. It is the contention of Appellant that the condemnation actions should be dismissed with prejudice because there was no meaningful hearing at a meaningful time prior to the taking of the property by trespass and invasion; such involuntary taking done without payment of compensation at the time of authorized entry as required by Art. 2, § 7 and § 24, Oklahoma Constitution, and 66 O.S. § 54.

On October 4, 1976, the Court of Appeals (Division 1) withdrew its decision of August 3, 1976, and replaced it with an order denying a hearing on the necessity and method of the taking. The court stated that Appellant had failed to specifically request a hearing on the necessity of the taking, thus waiving his right thereto. The court further asserted that Appellant was not entitled to a restraining order or injunction because he had adequate remedy at law. Thus, the Court of Appeals reversed its decision of August 3, 1976, and affirmed the lower court. (App. B, p. 16)

The appellant then filed a Petition for Rehearing on October 19, 1976, asking the Court of Appeals to reverse its decision of October 4, 1976, as violating Amendment XIV, U. S. Constitution. Appellant asked that the case be remanded to the District Court with instructions to dismiss the condemnation cases with prejudice and instruct the District Court to proceed with the actions in trespass and damages.

Thereafter, the Court of Appeals entered its order of November 23, 1976, overruling Petition for Rehearing. (App B, p. 25)

All of the foregoing decisions and orders unreported.

Appellant timely filed Petition for Writ of Certiorari on November 30, 1976, with the Supreme Court of Oklahoma, which is the only form of appeal permitted under 12 O.S. Ch. 15, App. 3, Rule 3.13. (App. A, p. 10)

The Supreme Court of Oklahoma entered its order of November 16, 1977, denying Writ of Certiorari which affirmed the decision of the Court of Appeals (Division 1). (App. B, p. 26)

Notice of Appeal was timely filed in the Supreme Court of Oklahoma on November 21, 1977. (App. D, pp. 1 and 5)

The appellant timely files this appeal from the final order of the Supreme Court of Oklahoma denying Writ of Certiorari. It is noted that the Supreme Court failed to rule on the constitutional issues involving due process and equal protection under Art. 2, § 7 and § 24, Oklahoma Constitution, and Amendments V and XIV, Sec. 1, Constitution of the United States.

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GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED

This is an appeal of two actions in trespass and three condemnation actions. One action in trespass is because of damages to Appellant's land. The other trespass action is because of damages to partnership cattle owned by Appellant and a partner, Les Starks. Mr. Starks is not a party to any of the condemnation proceedings and was never served with summons—the trespass actions originating and occurring prior to the time Appellee filed the condemnation actions and the time for authorized entry in condemnation provided in 66 O.S. § 53. Appellee continued to occupy the land in trespass after unlawful entry until Appellee obtained "color of title" at the time specified for authorized entry under the condemnation laws of Oklahoma.

The condemnation proceedings are authorized under 52 O.S. §§ 36.1-36.7 and 66 O.S. §§ 51-55. These condemnation statutes are invalid by reason of repugnancy to due process and equal protection of the law under Oklahoma Constitution, Art. 2, § 7 and § 24 and Amendments V and XIV, Sec. 1, Constitution of the United States. Said statutes further constitute denial of other federal rights whether or not capable of being brought here by appeal.

This appeal seeks review of the Order of November 16, 1977, denying Writ of Certiorari. (App. B, p. 26)

Request for rehearing is not permitted under 12 O.S. Ch. 15, App. 3—Rule 3.17 to review the Final Order of the Supreme Court of Oklahoma. (App. A, p. 13)

STATUTORY PROVISION CONFERRING JURISDICTION ON APPEAL

62 Stat. 929, 28 U.S.C. § 1257(2) confers on this Court jurisdiction of this appeal inasmuch as this appeal is filed within 90 days from the date of the final order of the Supreme Court of Oklahoma entered on November 16, 1977. (App. A, p. 6)

Cases believed to sustain jurisdiction of the court are the following:

—*Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972);

North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975).

SUBSTANTIAL FEDERAL QUESTIONS

A substantial federal question is presented requiring plenary consideration by this Court because of (a) lack of Jurisdiction, (b) arbitrary and capricious decisions and abuse of discretion by the trial court accompanied by (c) procedural and substantive deficiencies of due process in the pertinent law in the following questions, to-wit:

(1) Lack of jurisdiction because Certificate and Order No. 96,291, in Corporation Commission Case No. 35,868, issued on March 5, 1973, is void *ab initio* and void on its face. The certificate does not meet the requirements of 52 O.S. § 36.3(b) and § 36.4(b); or 56 Stat. 83; 61 Stat. 459 (15 U.S.C. § 717f(c) and (h)). (App. A, pp. 2, 15, 16; App. C, p. 1)

(2) Appellee was permitted to take the land of Appellant under an irrebuttable presumption of his right to do so. There was no meaningful hearing at a meaningful time to determine the Necessity for the Taking prior to entry in trespass or in condemnation. Appellant has not received nor has there ever been an untimely evidentiary hearing after entry in condemnation. Such hearing requested prior to time of authorized entry under Art. 2, § 24, Oklahoma Constitution, and 66 O.S. § 53. (Rec.-Ent.'s 7 and 8)

(3) The verified request for a restraining order and injunction to stop the trespass and resulting damages filed on June 11, 1973, and the later request for an injunction filed on March 1, 1974, to halt the trespass and damages were both ignored without allowing Appellant to elicit testimony from Appellee or allowing Appellant to present testimony prior to the orders of November 21, 1974. (Rec.-Ent.'s 25 and 43)

(4) Appellant timely requested an evidentiary hearing under 66 O.S. § 55 where testimony could be elicited from the commissioners (appraisers) to determine the method used to appraise the property taken and to determine what was taken. Such request, thereafter enjoined in the Order of October 31, 1973, and overruled in the orders of November 21, 1974. (App. B, pp. 5 and 7)

(5) Appellant was restrained instanter—without hearing—on October 24, 1974, from using all necessary "self help" against Appellee to stop Appellee's unlawful invasion, trespass and confiscation of Appellant's land. (App. B, p. 7)

These rulings described in (1) through (5) are invalid by reason of repugnancy to the due process and equal pro-

tection of law under Art. 2, § 7 and § 24, Oklahoma Constitution, and Amendments V and XIV, Sec. 1, Constitution of the United States. Said rulings further constituting denial of other federal rights whether or not capable of being brought here by appeal.

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STATEMENT OF CASE

For purposes of this appeal Maxwell Darks will be referred to as Appellant and Transok Pipe Line Company will be referred to as Appellee.

(1) Lack of Jurisdiction

Corporation Commission Case 35,868

On October 25, 1972, Appellee filed Case No. 35,868 before the Corporation Commission of Oklahoma seeking to obtain an order and certificate that an area consisting of approximately 3,660 acres of real property was suitable for the underground storage of natural gas in the "Channel Booch Formation." 680 contiguous acres in the warehouse are owned by Appellant. Such warehouse is situated in the matrix of the land approximately 2,500 feet below the surface in Hughes County, Oklahoma.

A Certificate and Finding is required by 52 O.S. § 36.4 that (a) the underground stratum or formation sought to be acquired is suitable for the underground storage of natural gas and that its use for such purposes is in the public interest; and (b) for a determination of the amount of recoverable oil and native gas, if any, remaining therein. There is no finding in the certificate attached to the petition of the recoverable gas in the formation as required by 52 O.S. § 36.4(b). (App. A, p. 16; App. C, p. 1)

Nor is there any finding or determination of the market value of the remaining gas in the warehouse as compared to the market value of the warehouse as required by 52 O.S. § 36.3(b). (App. A, p. 15)

560 acres owned by Appellant are included in these state court cases. 120 acres were included in the federal condemnation case by reason that Appellant was owner in co-tenancy in contiguous land in which restricted members of The Five Civilized Tribes were his co-tenants. Allegedly, this required all owners in those tracts to be condemned in the Federal District Court under 25 U.S.C. § 357 although it is not alleged or contended that the Appellant is an "allottee" or that the restricted Indians therein are "allottees." App. A, p. 5)

Testimony was elicited and transcribed before the Trial Examiner in the Corporation Commission on January 16, 1973. Testimony elicited from witness Sommers, Operating Superintendent for Appellee, on that date was in part as follows reflected at page 14 of the transcript of these proceedings:

> "WITNESS SOMMERS: We transport gas for Oklahoma Natural, sometimes for Arkla. We serve several

towns, and at the border, and Oklahoma Natural takes it over and distributes. . . ."

* * * * * *

(Ex. 1, Off. with Inst. to Comm. June 7, 1973; Rec. Entry 24)

The Trial Examiner submitted his recommended finding to the Corporation Commission followed by their issuance of Order No. 96,291, on March 5, 1973. This order was treated as the certificate required to be attached to the petition filed in the District Court seeking condemnation under 52 O.S. § 36.5. (App. C, p. 1)

Appellee has neglected to obtain the required Certificate of Convenience and Necessity from the Federal Power Commission prior to the commencement and construction of the warehouse or the bringing of the condemnation as required for interstate gas transmission companies under 56 Stat. 83 [15 U.S.C. § 717f(c)] and 61 Stat. 459 [15 U.S C. 717f(h)]. (App. A, p. 2)

The transcripts of all proceedings before the Corporation Commission were transcribed and introduced in the Hughes County District Court cases as Exhibits 1, 2, 3, 4 and 5. These Exhibits do not demonstrate any type of judicial determination on the necessity for the taking of property involved in this action.

District Court Actions

The Appellee then filed petitions with Order No. 96,291 attached in the Hughes County District Court on May 4, 1973. These cases were styled Transok Pipe Line Co. vs. Maxwell Darks, et al. These cases sought condemnation of

an "Easement" for an underground gas storage warehouse under 52 O.S. §§ 36.1-36.7 and 66 O.S. §§ 51-55. (App. A, pp. 13 through 22)

On the same day the petitions were filed, May 4, 1973, the Honorable Bob Howell, without notice to Appellant, entered an *ex parte* Preliminary Finding and Order that the Appellee has the power and right of eminent domain to condemn Appellant's land for its use and as underground gas storage warehouse which violates Art. 2, § 24, Oklahoma Constitution, requiring a judicial determination of the right to take the property. (Rec.-Entry 2;App.B,p.1)

Motions, Applications and Elections Filed and Rulings by the Court

Entry of Appearance, Motion to Disqualify Honorable Bob Howell, Motion to Dismiss and Special Demurrer were filed in these cases on May 29, 1973. (Rec.-Entries 5, 6, 7 and 8)

Motion to Appoint Advisory Petroleum Engineer was filed on May 31, 1973. (Rec.-Entry 12)

Election to Participate as joint owner in the warehouse was filed on May 31, 1973, amended on June 4, 1973. (Rec.-Entries 13 and 16)

Verified application for Temporary Restraining Order and Temporary Injunction was filed on June 11, 1973. (Rec.-Entry 25)

Motion to Dismiss with Prejudice and Request for Permanent Injunction was filed on March 1, 1974. (Rec.-Entry 43)

Motion to Dismiss filed because of harassment of Appellant and abandonment of condemnation proceedings was filed on September 11, 1974. (Rec.-Entry 47)

The Special Demurrer was filed attacking jurisdiction of the court.

The Motion to Dismiss filed on May 29, 1973, attacked procedural deficiency of 66 O.S. § 53 under due process. This Motion also attacked the failure of the Court to hold a timely judicial evidentiary hearing to determine the Necessity for the Taking prior to such taking.

Honorable Bob Howell was asked to disqualify because of personal prejudice against one of the attorneys representing Appellant on May 29, 1973.

Special Demurrer, Motion to Dismiss, Application to Set Aside Appointment of Appraisers, Motion to Appoint Advisory Petroleum Engineer and Amended Election to Participate were overruled in the interlocutory order of Honorable Rudolph Hargrave on June 28, 1973 (Rec.-Entry 33, App. B, p. 3)

Application for Temporary Restraining Order and Temporary Injunction filed on June 11, 1973, Motion to Dismiss with Prejudice filed on March 1, 1974, and Motion to Dismiss because of harassment of Appellant and abandonment of condemnation filed on September 11, 1974, were all overruled without allowing appellant to elicit testimony prior to November 21, 1974. (Rec.-Entry 51; App. B, p. 9)

All of the foregoing pleadings filed by Appellant are either unauthorized or prematurely filed under 66 O.S. § 53 and § 55 according to *Board of County Commissioners Creek County* v. *Casteel*, 522 P.2d 608 (Okl. 1974).

(2) Abuse of Discretion—Court Refused to Hold Evidentiary Hearing on Necessity of Taking.

Oral argument before the court on June 7, 1973, was presented to support Motion to Dismiss, right of Appellant to a timely evidentiary hearing on Necessity for the Taking and right of Appellant to timely evidentiary hearing for temporary restraining order and temporary injunction to stop the trespass. (Tr. pp. 41, 42 and 43)

Objections to the failure to hold a timely hearing on the Necessity for the Taking were also made in Exceptions to Commissioners Report, part IV, timely filed under 66 O.S. § 55 on July 3, 1973, and thereafter. (Rec.-Entries 28 and 37) This being overruled by the court, without evidentiary hearing where testimony could be elicited and presented on November 21, 1974. (App. B, p. 9) There has never been a judicial evidentiary hearing on the necessity for the taking nor has such been waived. The burden of requesting such a hearing is not on Appellant. He is entitled to such a hearing as a part of his due process rights. To rule otherwise is tantamount to saying that procedurally "if" a defendant charged with a felony does not request a preliminary hearing or a trial they are waived. A hearing on the Necessity of Taking must be specifically waived in the record or evidence must be presented on the necessity for the taking in a judicial hearing.

Appellant compiled with the requirements in the *published* decision of *County Commissioners of Creek County* v. *Casteel*, 522 P.2d 606 (1974). In the last sentence of the first paragraph on page 611 it is stated "only an *objection* to the report of the commissioners meets the statutory re-

quirements necessary for bringing forth the issue of the necessity of the taking. 66 O.S. 55." The case did not require that the landowner *specifically* request a hearing on the necessity for the taking.

Objection to the lack of a hearing on the necessity of taking is tantamount to requesting an evidentiary hearing to determine the necessity for the taking. The Appellee simply does not have the right to take private property of Appellant for a private purpose through condemnation.

(3) Abuse of Discretion—Court Refused to Hold Hearing to Determine if Restraining Order or Injunction Should Be Issued to Stop Trespass of Appellee.

The transcript of argument before the trial court on June 7, 1973, prior to the filing of the verified application for restraining order and temporary injunction on June 11, 1973, reflects the following statement by the attorney for Appellee. This statement followed a request for a restraining order and dismissal because of trespass prior to time of authorized entry under 66 O.S. § 53. Council for Appellee stated (Tr., p. 41):

Mr. Crane

"Your Honor, Mr. Smith tried to raise the same question and Mr. Darks did too, and Judge Howell told them at that time, I think quite properly that if there has been any damages done to Mr. Darks' property by reason of any illegal or improper entry by this company or any other, that he has an action at law. It has nothing to do with the motion to dismiss which is what we are suppose to be arguing right now."

Objections to *malicious* trespass in violation of Art. 2, § 24, Okla. Const., and U. S. Const., amend. XIV, was raised in the affidavit filed on June 11, 1973. (Rec.-Entry 25)

The *verified* application for such relief filed on June 11, 1973, stated in parts 2, 3 and 4 the following:

2. That prior to April 5, 1973, Transok Pipeline Company, through its agents and servants made entry upon this land for the express purpose of examining, preparing, and doing those things necessary to complete a proposed gas storage project so that they could thereafter maintain and operate such underground natural gas storage facilities.

3. That the defendant was advised on April 5, 1973, that the fences on his property had been cut, that gates had been left open when they were shut, and that bulldozers and work crews were on his land, along with work-over rigs, owned by parties unknown.

4. That on April 7, 1973, the defendant encountered members of a work crew, one of which admitted that he had been following instructions of Transok Pipeline Company and had participated in the work described in "3" above. That the other worker refused to say who he was with or what he was doing. That the defendant advised them to stay off of his property until they had authority under the law to make entry to his property.

Similar objections were raised by Motion to Dismiss with Prejudice and Request for Permanent Injunction filed on March 1, 1974. (Rec.-Entry 43) Both pleadings set out malicious and intentional cutting of fences, damages to registered Santa Gertrudis cattle, etc. The trial court refused to hold an evidentiary hearing stating the application for temporary restraining order, injunction and damages was

a separate cause of action. The applications were thereafter ignored until order of November 21, 1974, when such requests were overruled without allowing evidence to be elicited on these uncontroverted assertions. (App. B, p. 9)

Commencing on page 44 in transcript of testimony from Corporation Commission in Case No. 35,868, of July 2, 1973 (Ex. 4, Offered September 6, 1973; Tr. p. 87, line 18), the following questions were propounded with answers by Mr. Robert Lawrence, Vice President and General Counsel for Appellee:

"Q. So, in essence, you come in, you have been working on what you consider to be the gas storage project at this time?

A. That's right.

Q. And you were working on it prior to the time an order was entered in this commission?

A. That's right. . . .

* * * * * *

Q. Have you been on my property down there?

* * * * * *

(page 45):

* * * * * *

A. Yes, I understand they have been on your property."

On February 14, 1974, the court filed its order directing Appellee to specify what part of the deposit Appellee had placed with the Court Clerk in the commingled lump sum belonged to Appellant. The Appellant was authorized therein to withdraw same "*without prejudice to any of his legal rights in the case.*" (Emphasis ours) The Appellee

refused to comply with the order—without penalty—and Appellant could not obtain the interim compensation described in 52 O.S. § 54 until December 13, 1974. Appellant was forced to assume the burden of proving his ownership which was never questioned at any stage of the proceedings in an *ex parte* hearing. The *ex parte* proceedings and delivery of interim compensation being more than 21 months after Appellee admittedly was in possession of the land preparing and operating the warehouse. (Rec.-Entries 43, 47, 51, 52 and 53)

The Federal District Court refused to hold an evidentiary hearing to determine if a restraining order or injunction should be issued against Appellee in the companion case on July 24, 1973, and thereafter. The request for a hearing to stop the invasion and trespass bottomed on a verified assertion of trespass filed prior to the hearing on the Necessity for the Taking. However, the court proceeded to hold a hearing on the Necessity *for* the Taking on July 24, 1973. Appellant made offer of proof on July 24, 1973, to support the trespass and damages. The federal judge states in part as reflected at page 76 of the transcript in that case the following, ". . . If you have got a trespass complaint, I suggest you file a lawsuit against them for trespass. I am not going to be concerned with that. Your offer will be denied as not being material to this proceedings." (App. C, p. 7)

When the interim compensation was deposited with the Court Clerk in the state court cases on July 18, 1973, this gave Appellee the right of entry onto the land under 66 O.S. § 53 to commence construction of the underground

warehouse. It is here noted that because of the trespass of Appellee the underground warehouse was completed and in operation on the date authorized for entry onto the land. (App. A, p. 20) Likewise, 66 O.S. § 54 gave Appellant the right to "immediate receipt" of the deposit. Appellee maliciously commingled the deposit of all landowners in one lump sum without instructions as to distribution. (App. A, p. 21; Rec.-Entries 36 and 37) There was never any dispute in these cases as to ownership of various interest.

Trespass Action Filed and Dismissed by Supreme Court

With no remedy available in any of the cases described for continuing trespass damages, Appellant did as the Honorable Bob Howell and the Honorable Rudolph Hargrave (State Court) and the Honorable Fred Daugherty and the Honorable Joseph W. Morris (Federal District Court) instructed him to do if he desired relief for the continuing trespass. On November 24, 1974, he filed an action for trespass damages to his land. Appellant and Les Starks (cattle partnership) filed a cause of action for damages to cattle. Both cases seek actual and exemplary damages.

Temporary restraining order or injunction was not now sought because Appellee had succeeded in delaying the filing of the trespass actions until they obtained "color of title" and right of possession under the procedure described in 66 O.S. § 53. Further, Appellant was not financially able to post bond for the large volume of "put" or "take" gas in and out of the completed warehouse.

Appellee then reversed position and filed a petition seeking Writ of Prohibition with the Supreme Court of Oklahoma on these cases for trespass and damages alleging that they should be heard in the condemnation cases. The court issued Writs of Prohibition on September 8, 1975, with rehearing denied on December 9, 1975. (App. C, pp. 8 and 9)

With no instructions from the court as to where the trespass cases would proceed, Appellant included a request for trespass damages in his Motion for New Trial in the companion condemnation case brought in the Federal District Court under 25 U.S.C. § 357. On December 31, 1975, Honorable Joseph W. Morris refused to allow evidence in the federal district case of trespass damages at the second jury trial after having made the same ruling at the first jury trial. The reason stated for his refusal being the same reason stated earlier by Honorable Fred Daugherty in his refusal to hear testimony of trespass on July 24, 1973, in connection with granting of a restraining order or injunction—that the trespass damages is a separate cause of action. (App C, p. 10)

The Appellant filed a petition seeking Writ of Certiorari with this Court on March 5, 1976, in Case No. 75-1256, the petition seeking remedy because of the Final Order from the Supreme Court of Oklahoma in the companion trespass cases denying remedy for trespass. The Writ of Certiorari was denied on April 26, 1976.

(4) Abuse of Discretion—Commissioners Appointment and Their Return.

Honorable Bob Howell was asked to disqualify because of personal prejudice against one of the Attorneys representing Appellant. This request was made on May 29, 1973. However, the judge remained in the case to appoint commissioners on May 31, 1973, and instruct them on June 7, 1973. The theory for remaining in the case was that the appointment of appraisers was *administrative* rather than *judicial*. Then he disqualified.

At the time Honorable Bob Howell was instructing the commissioners, Honorable Rudolph Hargrave was also hearing the case and selected the instructions that were supposed to be given to the commissioners by Honorable Bob Howell in connection with the appraisement of Appellant's land. (Rec.-Entries 22, 23 and 24)

On June 1, 1973, Appellant filed his requested instructions for the commissioners to appraise (as to Appellant) damages to (1) (visible) surface, (2) easement from surface to the subsurface warehouse, (3) subsurface warehouse, and (4) 8/8ths of the minerals being condemned. These requested instructions were refused by Honorable Bob Howell and Honorable Rudolph Hargrave. (Rec.-Entry 24)

Honorable Rudolph Hargrave selected the instructions to be given to commissioners by Honorable Bob Howell on the property of Appellant. These instructions directed the commissioners to appraise the surface damage and the mineral interest being condemned in the "Channel Booch Formation" only. (Rec.-Entry 23)

Art. 2, § 24, Constitution of Oklahoma, requires that the commissioners be selected from the jury list. 66 O.S. § 53 requires that they be freeholders not interested in a like question be selected as appraisers. The freeholders are selected to appraise the underground warehouse under the same guidelines used in the appraisement of a railroad right-of-way over the visible surface. There is no requirement in the law that the appraisers be petroleum engineers, nor does the law require them to consult with anyone having expertise in the value of the subsurface gas storage warehouse. Nor does 66 O.S. § 53 make any provision to appraise the underground gas storage warehouse. The only thing that can actually be appraised under 66 O.S. § 53 in connection with the underground warehouse is ingress and egress across the visible surface to construct and maintain the facilities in the matrix below the visible surface.

The commissioners made their return showing they appraised (1) surface and (2) an undefined "royalty interest" in the 8/8ths of the gas "in place."

The commissioners have mistakenly treated the taking of the gas "in place" as though Appellant is to only receive an undisclosed amount of royalty therein. They make no mention of the value of the subsurface warehouse described in 52 O.S. § 36.3(c). (Rec.-Entry 26)

Appellant attempted to take deposition of the commissioners to determine the method of their secret appraisement but was enjoined from proceeding to take deposition on October 21, 1973. (App. B, p. 5)

Appellant timely filed his Exceptions to Commissioners Report and Request for Jury Trial on July 3, 1973. The

Exceptions attacking all errors and further requesting an evidentiary hearing (Part XIV) on the Report of Commissioners in order to cross-examine and elicit testimony from the commissioners as to their method of appraisement and also their *business* relationship with Appellee. The Exceptions amended on September 5, 1973. (Rec.-Entries 28 and 37) Such request for an evidentiary hearing overruled by the court in its order of November 21, 1974. (App. B, p. 9)

(5) Abuse of Discretion—Court Issued Restraining Order Against Appellant Without Hearing.

In early October, 1974, Appellant became exasperated because the court refused to hold a hearing to determine the necessity for the taking or hold a postseizure hearing on the method of taking. Nor could Appellant obtain interim compensation for the taking. Appellant advised Appellee by Western Union Mail-O-Gram that Appellee had 10 days to cease its unlawful invasion of his property and if they were still on his property at that time Appellant would use all necessary "self help" to eject Appellee. This was followed by receipt of a letter by Appellant from Appellee dated October 9, 1974, threatening Appellant with prosecution of a felony if he proceeded as he had suggested in his Mail-O-Gram. (Rec.-Entry 54)

The letter was followed by Appellant being served a carte blanche restraining order in open court on October 24, 1974—without a hearing—restraining Appellant from interfering with Appellee on Appellant's land. (App. B, p. 7)

ORDER APPEALED

The trial court thereafter entered its Final Orders of November 21, 1974, which forms the basis of this appeal. Under the procedure outlined in *Bd. Co. Com'rs Creek Co. v. Casteel*, 522 P.2d 608 (Okla. 74), appeal of this order must be commenced immediately, not after jury trial. Otherwise objections to the order are waived.

WHEN FEDERAL QUESTION WAS RAISED

Invalidity of the state law by reason of repugnancy under Amendments V and XIV, Constitution of the United States, was first raised by Motion to Dismiss filed on May 29, 1973. This objection "inter alia" raised the invalidity of 66 O.S. § 53. Under "II" therein the following is stated:

> "That the statutory procedure for the hearing of this action, the appointment of appraisers, and the assessment of damages does not meet procedural due process as required by Constitution of the United States." (Record Entry 7)

The oral argument before the court on June 7, 1973, on these points, alleged that to allow Appellee to take possession without an evidentiary hearing on the Necessity of the taking and without paying compensation was repugnant to Amendment XIV, Constitution of the United States. Counsel for Appellant states in part as reflected in the transcript of June 7, 1973, proceedings at page 43 the following:

> BY MR. SMITH:
>
> "Also, Your Honor, I will state this and I think this has probably become very clear to the Court in present-

ing of these motions this morning, uh, that the procedure allowed for the Oklahoma Constitution is not only antiquated but is grossly unfair and I am speaking as to the procedure as to this lawsuit, the combination. The statutes allow for this matter to be handled like a railroad case and this is what this case reminds me of, a railroad job. This whole statutes allows this company to come in and in effect take possession of these lands before anyone can even stand up and have their day in court. And it is for this reason that I would submit to the Court today that these Oklahoma Statutes, the procedural statutes allowing the bringing of this action are violations of every principle of procedural due process under the 14th amendment of the Constitution of the United States and are null and void on those grounds. . . ."

Thereafter counsel for Appellee objected to counsel for Appellant raising this contention because it is premature under the Oklahoma statutes.

Motion to Dismiss was then overruled in the Interlocutory Order of the Court of June 28, 1973. (App. B, p. 3)

Violation of due process and objections to the taking by trespass and invasion were raised in the District Court by verified Application for Temporary Restraining Order and Temporary Injunction filed on June 11, 1973. Parts 11 and 12 therein state as follows (Rec.-Entry 25):

> 11. That Article 2, Section 24 of the Constitution of Oklahoma specifically states that "Until compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietory rights of the owner divested."
>
> 12. That by reason of the fact that the statutes under which this condemnation are in violation of the due process clause of the United States Constitution and the Oklahoma Constitution; that a temporary injunction should be issued herein preventing the entry on to the property of the defendant until such time as the constitutional question of due process is resolved after the defendant has exhausted his legal rights herein.

The court did not permit Appellant to introduce evidence to support his verified Application of trespass and damages filed on June 11, 1973, and the application was overruled in the orders appealed herein on November 21, 1974. (App. B, p. 9)

All of the above objections are premature and not permitted in condemnation actions proceeding in violation of Art. 2, § 7 and § 24, Constitution of Oklahoma proceeding under 66 O.S. § 55. Only three pleadings are permitted under the "special" statutes, which are (1) The Petition, (2) Objections to Commissioners Report and (3) Request for Jury Trial. See *Board of County Commissioners of Creek County* v. *Casteel*, 522 P.2d 608 (Okl. 1974). (App. A, p. 21)

Appellant raised invalidity of state law by reason of repugnancy under due process of Amendments V and XIV in his Objections to Commissioners Report filed on July 3, 1973. (Rec.-Entry 28) This being the only place these issues can be raised under the "special" proceedings. These objections are filed *after* Appellee is already in possession of the land—without a timely evidentiary determination of the Necessity for the Taking or the payment of compensation to Appellant. Invalidity of the State law under Amendments V and XIV, Constitution of the United States, is raised in parts IV, IX and XIII therein as follows:

"IV.

"That when these condemnation cases were filed, immediately District Judge Bob Howell held an ex parte hearing without the defendants being advised or notified in which he entered an order that (1) Transok Pipe Line Company has the right of eminent domain and (2) the fact that said property is necessary and can be condemned by Transok Pipe Line Company purposes, all contrary to law including the defendants' right to be present and to contest such order. Further there is no showing in the testimony or record of this case that Transok Pipe Line Company produced any official of the company to testify in this matter. Defendants are entitled to be present and to have the right to cross-examination in such matters relative to the legal right to bring this condemnation and such ex parte hearing violates the defendants' due process rights under the 5th Amendment and the 14th Amendment of the United States Constitution.

* * * * * *

"IX.

"That the appraisers were not given the appropriate instructions submitted in behalf of the clients of Robert G. Grove and Mike Smith, nor were they instructed to read the transcript of testimony in Corporation Commission hearing in case no. 35,868 which was submitted to the court for this purpose and which points out at page 34 that there remains in the reservoir a minimum of 3 billion cubic feet of native natural gas to be used as 'cushion gas' only for the benefit of Transok Pipe Line Company and the instructions given to the commissioners are in violation of the due process clause of the 14th Amendment of the United States Constitution.

* * * * * *

"XIII.

"That these proceedings are void and should not be allowed to continue as to the defendant Maxwell Darks, specifically, as he has evidenced his intent to participate as a joint-owner in the gas storage project, which would be in the public interest and allow the defendant, Maxwell Darks, to use his property constituting approximately 15% of the gas storage warehouse for its highest and best known use and allow the condemnation action to proceed, if it is a legal procedure otherwise, and to not allow this owner to use his land and participate in the gas storage warehouse project is in violation of said defendant's rights under the 14th Amendment of the United States Constitution."

All objections were overruled by the trial court in its Orders of November 21, 1974. (App. B, p. 9)

On appeal, both Petition-in-Error filed on December 19, 1974, and the Amended Petition-in-Error filed on July 10, 1975, alleged violation of "due process and equal protection of the law."

The Brief filed by Appellant on appeal alleged invalidity of the State law described herein. Invalidity alleged because of repugnancy to Amendment XIV, Constitution of the United States. At page 19 therein the following is stated:

> "Appellant should not be prohibited from using his share of the warehouse and participating in this project as a joint venturer. See Art. 2, Sections 23 & 32, Oklahoma Constitution and Amendment Fourteen, United States Constitution."

Order of the Court of Appeals (Division 1) of August 3, 1976 (App. B, p. 11), states in part the following:

"Appellant's exceptions to the report of the commissioners was timely filed and it contains the following:

'That when these condemnation cases were filed, immediately District Judge Bob Howell held an ex parte hearing without the defendants being advised or notified in which he entered an order that (1) Transok Pipe Line Company has the right to eminent domain and (2) the fact that said property is necessary and can be condemned by Transok Pipe Line Company purposes, all contrary to law including the defendants right to be present and to contest such order. Further there is no showing in the testimony or record of this case that Transok Pipe Line Company produced any official of the company to testify in this matter. Defendants are entitled to be present and to have the right to cross-examination in such matters relative to the legal right to bring this condemnation and such ex parte hearing violates the defendants due process rights under the 5th Amendment and the 14th Amendment of the United States Constitution.'

"The above allegations stand uncontroverted.

"The trial court held no hearing after the filing of said exceptions to determine the question of the necessity of taking. This failure constituted a denial of procedural due process as well as a denial of due process from a substantive standpoint. Appellant was entitled to an adversary hearing after reasonable notice. The failure to afford such hearing constitutes reversible error, and renders void all proceedings which transpired in these cases after the exceptions were filed.

"In Board of County Com'rs of Creek County v. Casteel, 522 P.2d 608 (Okla. 1974), the Court said:

'The fact that the landowners have a constitutional right to be heard on the necessity of the taking is unquestioned.'

"The Orders overruling Appellant's 'Exceptions to Commissioners' Report' is hereby reversed and this case is remanded with direction for the trial judge to hold an adversary hearing on said exceptions after the giving of reasonable notice of the parties involved, and then proceed as provided by law."

Petition for Rehearing filed on August 18, 1976, with the Court of Appeals (Division 1) contained in part the following:

"II

"That the Appellant agrees with this Honorable Court's decision that the denial of this Appellant of a meaningful hearing on the right of Appellee to exercise eminent domain and the necessity of the taking of Appellant's property constituted a denial of both procedural and substantive due process under the Fourteenth Amendment to the United States Constitution. As this Honorable Court stated, the failure to afford such a hearing constitutes reversible error. Appellant further maintains, however, that the holding of a meaningful hearing can be no more than an empty exercise unless held at a meaningful time. . . ."

In the next to the last paragraph of the Order of the Court of Appeals (Division 1) issued on October 4, 1976, which reverses its Order of August 3, 1976, the Court states (App. B, p. 24):

"The landowner in the instant case filed exceptions to the report of the commissioners within the statutorily prescribed time, but failed to specifically request a hearing on the necessity of the taking, so his right thereto was waived."

Petition for Rehearing filed with the Court of Appeals (Division 1) on October 19, 1976, alleged in part 3 of the following:

"3. Appellant maintains that both procedural and substantive due process rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States have been violated inasmuch as Title 66 O.S. § 51, et. seq. and Title 52 O.S. §§ 36.1 through 36.5 wholly fail to provide for a hearing on the necessity and method of taking Appellant's property prior to its deprivation by Appellee. The landmark United States Supreme Court case of Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972), clearly requires that a meaningful hearing must be held at a meaningful time prior to any deprivation of property, however slight or temporary. . . ."

Overruled by the Court on November 23, 1976. (App. B, p. 25)

Petition for Writ of Certiorari filed with the Supreme Court of Oklahoma on November 30, 1976, alleged in parts IV and VI the following:

"IV

"Appellee deprived this Appellant of his real property under the provisions of Title 66 O.S., Section 51, et. seq. and Title 52 O.S., Sections 36.1 through 36.5. These statutes do not meet minimum standards of procedural and substantive due process as guaranteed by

the Fourteenth Amendment to the Constitution of the United States, inasmuch as there is no provision for a meaningful hearing following adequate notice to a condemnee, such as Appellant, prior to the taking under Art. 2, Section 24 of the Oklahoma Constitution. Operating under this procedure, Appellee obtained the right to take Appellant's property, obtained title to same and trampled upon Appellant's Fourteenth Amendment rights in the process.

* * * * * *

"VI

"Appellant further maintains that the Court of Appeals failed to consider the question of Appellant's right to take the deposition of the Commissioners to determine their business relationship with Appellee, as noted in Appellant's Exceptions to Commissioners Report and the failure of the trial court to allow this discovery violated appellant's right to a fair and impartial report as contemplated by 66 O.S. § 55(A) and violates his substantive due process rights under the 14th Amendment of the United States Constitution."

Overruled by the Supreme Court of Oklahoma in its Order sustaining the lower court on the 16th day of November, 1977. (App. B, p. 26)

This appeal proceeds herein from this final order by the Supreme Court of Oklahoma.

WHY FEDERAL QUESTIONS ARE SUBSTANTIAL

It is conservatively estimated that over 20 condemnation actions are filed in the state courts of this country every day they are open for business. These cases involve citizens' property rights as well as mental pain and suffering and millions of dollars in damages.

Many states, like Oklahoma, allow corporations and the state itself, to bring actions under antiquated laws. Many states still proceed under statutes sponsored by the railroads when the railroad barons were, in fact, our kings. The State of Oklahoma itself and our present day petroleum barons use the same laws in condemnation actions. The gas transmission companies use these condemnation laws to obtain pipeline right-of-way, underground gas storage warehouses, etc. The State of Oklahoma uses these condemnation laws for acquiring highway right-of-way and other forms of condemnation even where federal funds are involved.

Art. 2, § 7 and § 24, Constitution of Oklahoma requires a judicial determination on the Necessity for the Taking prior to the taking which would include an evidentiary hearing to determine if a restraining order or injunction should be issued to halt the invasion and taking prior to time for authorized entry under 66 O.S. § 53 or the payment of compensation under 66 O.S. § 54.

The commissioners were not required to appear at an evidentiary hearing to explain the method of appraisement or what was actually appraised in the presence of the Appellant under 66 O.S. § 55. The appraisement is secret, as far as the condemnee is concerned, with the reasons for the

appraisement known only to the court, the commissioners and the condemnor. It is herewith noted that apparently two of the three appraisers were doing business with the Appellee while appraising the land of Appellant. (Rec.-Entry 37, see exhibits)

If the individual landowner tries to defend his property from the invasion using all necessary "self help" he will be restrained or enjoined by the court—without an evidentiary hearing—from using such method of defense. Obviously there is no equal protection or due process for the individual owner pitted against a powerful corporation while having his land involuntarily taken from him.

The owner is defeated under the legal maxim "possession is 9 points of the law" without an evidentiary hearing. This procedure clearly demonstrates that another legal maxim—condemnation proceedings will be strictly construed against the condemnor—is strictly a legal myth. The conglomerate corporation is thus permitted to proceed unobstructed under an irrebuttable presumption of the right to take in condemnation.

The only recourse for remedy remaining for the individual landowner in situations such as this is open rebellion and violation of the court's order directing that the owner is restrained from defending his land. It is noted that because of the trespass prior to the time of authorized entry under 66 O.S. § 53, which was July 18, 1973, the underground warehouse was already completed on that date.

In the Answer Brief filed by Appellee on January 26, 1975, Appellee states in part at page 19, "A corporation with the power of eminent domain can never trespass so long

as the use or intended use is a public function. . . ." At page 26 therein Appellee states in part, "It is submitted that Appellant has no action in tort. . . ." At page 28 therein Appellee denied that Appellant is even entitled to have the Supreme Court of Oklahoma make a judicial determination of the legality of the proceedings under due process pertaining to 66 O.S. §§ 51-55, stating in part, ". . . if appellant is offended thereby, then his remedy is one of the legislative rather than judicial."

Appellant, and those similarly situated, cannot have their "one" day in court. The condemnation law is written to procedurally and substantively favor Appellee. Appellant must face, at a minimum in this particular case, proceedings in three forums in order to defend his land.

The proceedings under 52 O.S. §§ 36.1-36.7 and 66 O.S. §§ 51-55 require proceedings before the Corporation Commission of Oklahoma, followed by condemnation proceedings in the District Court as set out under 52 O.S. § 36.5. The Oklahoma courts have construed 66 O.S. § 53 in such a way in the *Casteel* case that *no counter claim* or *answer* can be filed by appellant. Thus 12 O.S. § 1396 is inoperative unless the litigant is the plaintiff in a separate action. (App. A, p. 10) This prevents any hearing in the District Court condemnation action to see if a temporary restraining order or injunction should issue. A third action must be filed by the landowner in the appropriate situation. All of the foregoing without a judicial evidentiary hearing to determine Appellee's right to take the land in the State court. These treadmill proceedings are designed to destroy the financial and emotional ability of the landowner to resist the taking of his land.

Appellee has been permitted to invade private property and cause malicious and intentional damages. All of this without an evidentiary hearing to halt the trespass; or determine the necessity for the taking; or to determine the method of the taking. Under this procedure Appellee cannot lose provided: (a) He can get a court order restraining Appellant from interfering and (b) Appellant is a middle class citizen TRAINED throughout life to obey the laws and play by the rules.

The court is allowing Appellee to confiscate an easement from the surface to the subsurface warehouse at approximately 2,500 feet, the subsurface warehouse and the minerals in place except for an undisclosed royalty. This allows the gas transmission company to be elevated to a position of primacy and prestige exceeding the supreme sovereign, the United States of America, from which the right of condemnation springs. The United States is required to pay for underground gas storage facilities such as those described in 52 O.S. § 36.3(c). See *Emeny* v. *U. S.*, 412 F.2d 1319 (1969).

Individuals *do* own interest in underground gas storage warehouses throughout the United States but many states now allow the Gas Transmission Companies to condemn them if the corporations think it is to their financial advantage. Gas Transmission Companies also lease underground gas storage warehouses using the threat of condemnation if the landowner does not capitulate and agree to their offer.

In *Stork, et al.* v. *Cities Service Gas Co.*, Vol. 48 Okla. Bar Journal, p. 2632, No. 48,789, decided Nov. 22, 1977, the landowners alleged that Cities Service Gas Co. used threats

of condemnation if the landowners did not agree to their offer to lease certain land for gas storage purposes. In the last paragraph of column 1 on page 2633 in this case the Court states the following:

> "The gas storage lease was negotiated, in part, on the premises parties could thereby avoid a lawsuit to condemn the underground strata. Cities Service's landman, from the beginning of the lease negotiations, informed Storks that condemnation proceedings would be had if the lease was not concluded. We will not say Storks, by entering into the lease in lieu of condemnation, divested themselves of protections available to them under condemnation statutes in the facts of this case."

The due process questions as to how the taking occurred in this case before the Court and in the *Storks* case are as old as civilization itself. The foregoing method of taking by harassment and the brutalization of the individual landowner under the condemnation laws are the prevailing law in Oklahoma today. Corporations use these barbarian tactics in dealing with individual landowners while ignoring Art. 2, § 7 and § 24, Constitution of Oklahoma.

There is no decision in recent times by the Supreme Court of the United States establishing minimum guidelines for procedural and substantive due process and equal protection to protect the property rights of individuals having their property involuntarily taken from them by a government body or a corporation allegedly cloaked with the power of eminent domain. Appellee relies on *Bailey* v. *Anderson*, 326 U.S. 203, 90 L.Ed. 3, 66 S.Ct. 66 (1945), decided some 27 years prior to *Fuentes* and not germane to this case.

This case presents a substantial federal question of great import to Appellant and others similarly situated procedurally and/or substantively throughout the United States now and in the future. The procedure used herein applies generally in all types of condemnation cases, not just condemnation of underground gas storage warehouses. However, underground gas storage warehouses are now being condemned in significant numbers throughout the United States.

The burden of proof is not on the pipeline company. They are not required to prove that they have the right to condemn. The landowner is required to assume the burden of proving that Appellee is not entitled to take the land. Since the courts do not allow the landowner to offer any evidentiary proof to show that the land is not required for a public use, the Appellant has a difficult burden—to say the least.

Condemnation litigants lack the financial means, emotional staying power and expertise to appeal or protest similar takings, their only remedy being to buckle under because of the awesome power of the conglomerate gas transmission company, or rebel against the removal of their equal protection and due process rights under our Constitution.

For purposes of argument let us assume that there are occasions where an emergency arises requiring the federal, state or local government to invade property without notice or an evidentiary hearing to determine the need to act. Such is not the case before the Court. The only case before the Court is the case of an overbearing and ruthless con-

glomerate that has proceeded to plunder Appellant's emotions and property strictly for profit. The underground warehouse would operate just as efficiently with Appellant participating in his pro rata part therein.

It would be grossly unjust to require the Appellant to be subjected to further treadmill litigation to nowhere. His due process rights have obviously been violated in a harsh manner by abusive procedure and arbitrary and capricious rulings by the court tantamount to cruel and unusual punishment. These rulings are invalid as being repugnant to Art. 2, § 7 and § 24, Oklahoma Constitution, and Amendments V and XIV, Sec. 1, Constitution of the United States. Said statutes further constituting denial of other federal rights whether or not capable of being brought here by appeal.

Individuals do own gas storage warehouses in various states and the Appellant should be allowed to own his pro rata part in this warehouse and participate in the operation of this storage facility. Appellant has been denied remedy.

The State court has decided a federal question of substance in a way not in accord with applicable decisions of this Court.

Cases which sustain jurisdiction herein are:

—*Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 56, 92 S.Ct. 1983 (1972);

North Georgia Finishing v. *Di-Chem*, 419 U.S. 610, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975).

CERTIFICATION OF RECORD

Because issues in No. 73-93 (T.C.) 48,054 (S.Ct.) are the same issues as those in No. 73-94 (T.C.) 48,055 (S.Ct.) and No. 73-95 (T.C.) 48,056 (S.Ct.), only the first record was transmitted from Hughes County District Court to the Supreme Court of Oklahoma per request of the Supreme Court of Oklahoma. Certification and transmittal of the cumulative records, which are still with the Court Clerk, Hughes County, Oklahoma, are waived by Appellant. They will not be required unless otherwise specified by Appellee or the Supreme Court of the United States.

CONCLUSION

The condemnation actions should be dismissed with prejudice. A permanent injunction should be issued against Appellee forbidding further trespass and confiscation over, under or in Appellant's land. The trespass actions should be remanded to the lower court with instructions for the lower court to allow Appellant to proceed with his actions in trespass.

Respectfully submitted,

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A.C. 405-236-1416

Attorneys for Appellant

January, 1978

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Jurisdictional Statement were mailed on this ..... day of ....., 1978, first class postage fully prepaid, to:

(1) Mr. Kenneth East
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APPENDICES

APPENDIX A

(1) U.S. CONST., amend. V, Due Process Clause [U.S.C.A. Const. Amend. V, p. 4]

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2) U.S. CONST., amend. XIV, Sec. 1 [U.S.C.A. Const. Amendments 13 to 14, p. 33]

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(3) 52 Stat. 824 (15 U.S.C. §717), 56 Stat. 83 (15 U.S.C. § 717f(c)), 61 Stat. 459 (15 U.S.C. § 717f(h)) [15 U.S. C.A. 141, pp. 384, 385, 386]

15 U.S.C. NATURAL GAS § 717

§ 717f. Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transporation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under the rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. June 21, 1938, c. 556, § 7. 52 Stat. 824; Feb. 7, 1942, c. 49, 56 Stat. 83; July 25, 1947. c. 333, 61 Sat. 459.

25 U.S.C. INDIANS

(4) 31 Stat. 1084 (25 U.S.C. § 357), [25 U.S.C.A., p 426]

§ 357 Condemnation of lands under laws of States

Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Mar. 3, 1901, c. 832, § 3, 31 Stat. 1084.

28 U.S.C. JUDICIARY AND JUDICIAL PROCEEDINGS

(5) 62 Stat. 929 (28 U.S.C. § 1257) [28 U.S.C.A., § 1251, p. 144].

§ 1257. State courts—Appeal—Certiorari.—Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. (June 25, 1948, c. 646, § 1, 62 Stat. 929.)

OKLAHOMA CONSTITUTION

(6) OKLA. CONST. art. 2, Bill of Rights § 7 Okl. Stats. 1971 Official Ed. p. 54 [O.S.A. Const. Art. 2, § 7, p. 425]

§ 7. Due process of law

No person shall be deprived of life, liberty, or property, without due process of law.

(7) OKLA. CONST. art. 2, Bill of Rights § 23. 1 Okl. Stats. 1971 Off. Ed., p. 64 [O.S.A. Const. Art. 2, § 23, p. 822]

§ 23. Private property—Taking or damaging for private use

No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law.

(8) OKLA. CONST. art. 2, Bill of Rights, § 24. 1 Okl. Stat. 1971 Off. Ed., p.65 [O.S.A. Const. Art. 2, § 24, p. 827]

§ 24. Private property.—Public use—Character of use a judicial question

Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the

sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.

12 Ok. St. CIVIL PROCEDURE

(9) 1 Okl. Stats. 1971 Official Ed., p 912 [12 Okl. St. Ann. § 1, p 15]

§ 3. Division of remedies

Remedies in the courts are divided into:

First, Actions.

Second, Special proceedings, R.L. 1910, § 4643.

(10) 1 Okl. Stats. 1971 Official Ed., p 912 [12 Okl. St. Ann. § 1, p 17]

§ 4. Action defined

An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. R.L. 1910, § 4644.

(11) 1 Okl. Stats. 1971 Official Ed., p 912 [12 Okl. St. Ann. § 1, p 20]

§ 5. Special proceedings

Every other remedy is a special proceeding. R.L. 1910, § 4645.

(12) 1 Okl. Stats. 1971 Official Ed., p 1083 [12 Okl. St. Ann. § 1381, p 7]

§ 1382. Cause for injunction—Temporary injunction.

When it appears, by the petition, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when, during the pendency of an action, it shall appear, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, or to render the judgment ineffectual, a temporary injunction may be granted to restrain such removal or disposition. It may, also, be granted in any case where it is specially authorized by statute. R.L. 1910, § 4867.

(13) 1 Okl. Stats. 1971 Official Ed., p 1084 [12 Okl. St. Ann. § 1381, p 50]

§ 1383. When and by whom injunction granted—Affidavit showing right to

The injunction may be granted at the time of commencing the action, or any time afterwards, before judgment by the district court, or the judge thereof, or, in his absence from the county or disqualification, by the county judge, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto. R.L. 1910, § 4868.

(14) 1 Okl. Stats. 1971 Official Ed., p 1084 [12 Okl. St. Ann. § 1381, p 54]

§ 1384. Notice to adverse party—Temporary restraint

If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose, at a specified time and place, and may, in the meantime, restrain such party. R.L. 1910, § 4869.

(15) 1. Okl. Stats. 1971 Official Ed., p 1086 [12 Okl. St. Ann. § 1381, p 77]

§ 1396. Injunction by defendant.—A defendant may obtain an injunction upon an answer, in the nature of a counterclaim. He shall proceed in the manner hereinbefore prescribed. R.L. 1910, § 4880.

(16) Okl. Stats. 1977 Supp. Official Ed. p. 439; [12 Ok. St. Ann. § 951, p 90 p.p.]

Rule 3.13. Review by Supreme Court on certiorari

A. A review of an opinion of the Court of Appeals in the Supreme Court on writ of certiorari as provided in 20 O.S. 1971 § 30.1 is a matter of sound judicial discretion and will be granted only when there are special and important reasons and a majority of the justices direct that certiorari be granted. The following, while neither controlling nor fully measuring the Supreme Court's discretion, indicate the character of reasons which will be considered:

(1) Where the Court of Appeals has decided a question of substance not heretofore determined by this court;

(2) Where the Court of Appeals has decided a question of substance in a way probably not in accord with

applicable decisions of this court or the Supreme Court of the United States;

(3) Where a division of the Court of Appeals has rendered a decision in conflict with the decision of another division of that court;

(4) Where the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by a trial court as to call for the exercise of this court's power of supervision.

B. A party who did not petition for rehearing in the Court of Appeals may not petition for certiorari.

Amended, effective Feb. 28, 1972; amended Sept. 3, 1976, effective Oct. 30, 1976.

(17) Okl. Stats. 1977 Supp. Official Ed., p. 439; [12 Ok. St. Ann. § 951, p 90 p.p.]

Rule 3.14. The petition for certiorari—Contents

A. An application for certiorari shall be by petition only which shall contain the following to be set forth in the order here indicated:

(1) The citation of the opinion in Oklahoma Bar Association Journal if published, and if not published, a copy of the opinion shall be appended to each copy of the petition;

(2) A concise statement as to: (a) the date of the judgment or decision sought to be reviewed and (b) the date of any order concerning a rehearing;

(3) An outline of the reasons for review as suggested in Rule 3.13, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised

therein. Only the questions set forth or fairly comprised therein will be considered.

(4) The reasons for granting writ shall be supported by:

(a) A concise statement of fact containing the matters material to consideration of the questions presented.

(b) A direct and concise argument amplifying the reasons relied on for the allowance of the writ.

(5) The style of the petition for certiorari shall be the same as in the petition in error. If there be more than one petition in error, the style shall be the same as that in the petition in error which was determined to commence the principal appeal.

B. No petition for writ of certiorari shall exceed in length, ten 8½" x 14" double spaced pages, exclusive of the appendix.

C. All contentions in support of a petition shall be set forth in the body thereof as provided in Section A of this rule. No separate brief in support of the petition will be received and the clerk shall refuse to file any petition to which is annexed or appended any supporting brief.

D. The failure to present with accuracy, brevity and clarity matters essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying a petition.

E. The petition shall be served upon the respondent who may within ten (10) days thereafter file and serve upon the petitioner an answer in opposition to petition which shall be succinct and shall not exceed in length, ten 8½" x 14" double spaced pages. A concise reply of not more than five 8½" x 14" double spaced pages may be filed and served upon the respondent within ten (10) days after filing of the answer. The reply should be addressed to arguments

raised in answer which petitioner does not believe to be sufficiently covered in his petition. The court need not delay decision pending filing of a reply.

F. The petition, answer and reply shall not reach the merits of the appeal but rather pertain to reasons Supreme Court should review the decision of the Court of Appeals.

G. The petition for certiorari shall be filed with the clerk of the Supreme Court within fifteen (15) days from the date the order either denying or dismissing a petition for rehearing was filed by the Court of Appeals. The time for such application shall not be extended. Petition, answer and reply shall be accompanied by ten (10) legible copies.

H. Any party may file a supplemental pleading while a petition for certiorari is pending, calling attention to new cases or legislation or other intervening matter not available at the time.

(18) Okl. Stats. 1977 Supp. Official Ed. p. 440; [12 Ok. St. Ann. § 951, p. 91 p.p.]

Rule 3.17 Denial of writ

When a petition for writ of certiorari is denied an order shall be entered to that effect and the mandate shall issue. If writ of certiorari is denied, no petition for rehearing may be filed in the Supreme Court.

Amended Sept. 3, 1976, effective Oct. 30, 1976.

(19) 2 Okl. Stats. 1971 Official Ed., p 3072 [52 O.S.A. § 1, p 31]

52 O.S., GAS COMPANIES AND PIPE LINES
UNDERGROUND STORAGE OF GAS

§ 36.1 Definitions

As used in this Act[1] (a) "underground storage" shall mean storage in a subsurface stratum or formation of the earth; (b) "natural gas" shall mean gas either while in its

original state or after the same has been processed by removal therefrom of component parts not essential to its use for light and fuel; (c) "native gas" shall mean gas which has not been previously withdrawn from the earth; (d) "natural gas public utility" shall mean any person, firm or corporation authorized to do business in this State and engaged in the business of transporting or distributing natural gas by means of pipe lines into, within or through this State for ultimate public use; (e) "commission" shall mean the State Corporation Commission.

Laws 1951, p. 134, § 1, eff. May 26, 1951.

(20) 2 Okl. Stats. 1971 Official Ed., p 3073 [52 Okl. St. Ann. § 1, p 32]

§ 36.2 Public interest and welfare

The underground storage of natural gas which promotes conservation thereof, which permits the building of reserves for orderly withdrawal in periods of peak demand, which makes more readily available our natural gas resources to the domestic, commercial and industrial consumers of this State, and which provides a better year-round market to the various gas fields, promotes the public interest and welfare of this State.

Therefore in the manner hereinafter provided the commission may find and determine that the underground storage of natural gas as hereinbefore defined is in the public interest.

Laws 1951, p. 134, § 2, eff. May 26, 1951.

(21) 2 Okl. Stats. 1971 Official Ed., p 3073 [52 Okl. St. Ann. § 1, p 33]

§ 36.3 Condemnation of subsurface stratum or formation—Operation of storage facilities—Limitations

Any natural gas public utility may condemn for its use for the underground storage of natural gas any subsurface

stratum or formation in any land which the commission shall have found to be suitable and in the public interest for the underground storage of natural gas, and in connection therewith may condemn such other interests in property as may be required adequately to examine, prepare, maintain and operate such underground natural gas storage facilities; provided, however, that the right of condemnation of underground sands, formations and strata, granted hereby, shall be limited as follows:

(a) No sand, formation, or stratum which is producing or which is capable of producing oil in paying quantities, through any known recovery method, shall be subject to appropriation hereunder;

(b) No gas bearing sand, formation, or stratum shall be subject to appropriation hereunder, unless the volumes of native gas originally in place therein shall be shown to be substantially depleted, and that such sand, formation or stratum has a greater value or utility as a gas storage reservoir for the purpose of insuring an adequate supply of natural gas for any particular class or group of consumers of natural gas, or for the conservation of natural gas, than for the production of the relatively small volumes of native gas which will remain therein, provided that no gas sand, formation or stratum shall be condemned under the terms of this Act[1] when the gas therein is being used for the secondary recovery of oil, unless gas in necessary and required amounts is furnished to the operator or operators of the secondary recovery operations for as long as oil is produced in paying quantities in the secondary operations for the recovery of oil at the same cost as that at which the gas was being produced at the time of condemnation by the operator of the secondary recovery project or projects.

(c) Only such area of such underground sand, formation or stratum as may reasonably be expected to be penetrated by gas displaced or injected into such underground gas storage reservoir may be appropriated hereunder.

(d) No rights or interest in existing underground gas reservoirs, being used for the injection, storage and withdrawal of natural gas, owned or operated by others than the condemner, shall be subject to appropriation hereunder.

The right of condemnation hereby granted shall be without prejudice to the rights of the owner of said lands or of other rights or interests therein to drill or bore through the underground stratum or formation so appropriated in such manner as shall comply with orders, rules and regulations of the commission issued for the purpose of protecting underground storage strata or formations against pollution and against the escape of natural gas therefrom and shall be without prejudice to the rights of the owner of said lands or other rights or interests therein as to all other uses thereof. The additional cost of complying with such regulations or orders in order to protect the storage shall be paid by the public utility.

Laws 1951, p. 135, § 3, eff. May 26, 1951.

(22) 2 Okl. Stats. 1971 Official Ed., p 3073 [52 Okl. St. Ann. § 1, p 34]

§ 36.4 Certificate of commission

Any natural gas public utility desiring to exercise the right of eminent domain as to any property for use for underground storage of natural gas shall, as a condition precedent to the filing of its petition in the district court, obtain from the commission a certificate setting out findings of said commission (a) that the underground stratum or formation sought to be acquired is suitable for the underground storage of natural gas and that its use for such purposes is in the public interest; (b) the amount of recoverable oil and native gas, if any, remaining therein; provided, that the commission shall issue no such certificate until after public hearing is had on application, pursuant to notice served in compliance with notice in civil actions

in the district court, together with notice published at least once each week for two (2) successive weeks in some newspaper of general circulation in the county or counties where the gas is proposed to be stored, the first publication to be at least ten (10) days prior to the date of the hearing.

Laws 1951, p. 135, § 4, eff. May 26, 1951.

(23) 2 Okl. Stats. 1971 Official Ed.; p 3074 [52 Okl. St. Ann. § 1, p 35]

§ 36.5 Petition to district court—Examination and determination—Subsequent proceedings

Any natural gas public utility having first obtained a certificate from the commission as hereinbefore provided, desiring to exercise the right of eminent domain for the purpose of acquiring property for the underground storage of natural gas shall do so in the manner hereinafter provided. Such natural gas public utility shall present to the district court of the county wherein the land is situated, or to the judge thereof, a petition setting forth the purpose for which the said property is sought to be acquired, a description of the property sought to be appropriated and the names of the owners thereof as shown by the records of such county. The petitioner shall file the certificate of the commission as a part of its petition and no order by the court granting said petition shall be entered without such certificate being filed therewith. The court or the judge thereof shall examine said petition and determine whether the petitioner has the power of eminent domain and whether said property is necessary to its lawful purposes, and if found in the affirmative, such finding shall be entered in the record and subsequent proceedings shall follow the procedure now provided by law in the exercise of the rights of eminent domain by railroads.

Laws 1951, p. 136, § 5, eff. May 26, 1951.

(24) 2 Okl. Stats. 1971 Official Ed., p 3074 [52 Okl. St. Ann. § 1, p 36]

§ 36.6 Ownership of gas

All natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities, shall at all times be deemed the property of the injector, his heirs, successors or assigns; and in no event shall such gas be subject to the right of the owner of the surface of said lands or of any mineral interest therein, under which said gas storage fields, sands, reservoirs, and facilities lie, or of any person other than the injector, his heirs, successors and assigns, to produce, take, reduce to possession, waste, or otherwise interfere with or exercise any control thereover, provided that the injector, his heirs, successors and assigns, shall have no right to gas in any stratum, or portion thereof, which has not been condemned under the provisions of this Act,[1] or otherwise purchased.
Laws 1951, p. 136, § 6, eff. May 26, 1951.

(25) 2 Okl. Stats. 1971 Official Ed., p 3074 [52 Okl. St. Ann. § 1, p 37]

§ 36.7 Partial invalidity

If any section, paragraph, sentence or phrase of this Act[1] shall be declared unconstitutional or void for any reason by any court of final jurisdiction, such decision shall not, in any way, invalidate or affect any other section, paragraph, sentence or phrase of this Act, but the same shall continue in full force and effect.
Laws 1951, p. 136, § 7.

(26) 3 Okl. Stats. 1971 Official Ed., p 3517 [60 Okl. St. Ann. § 1, p 73]

60 O.S., ESTATES IN REAL PROPERTY

§ 64. Fee title covers what

The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.

66 Ok. St. RAILROADS

(27) 3 Okl. Stats. 1971 Official Ed., p 3986 [64 Okl. St. Ann. § 1, p 286]

§ 51 Power to enter upon and appropriate lands

Every railroad corporation incorporated under this Article,[1] and any railroad corporation authorized to construct, operate or maintain a railroad within this State, has power and is authorized to enter upon any land for the purpose of examining and surveying its railroad, and to take, hold and appropriate so much real estate as may be necessary for the location, construction and convenient use of its road, including all necessary grounds for buildings, stations, workshops, depots, machine-shops, switches, sidetracks, turntables, snow defences and water stations; all material for the construction of such road and its appurtenances, and the right of way over adjacent land sufficient to enable such corporation to construct and repair its road and the right to conduct water to its water stations, and to construct and maintain proper drains, and may obtain the right to such real estate by purchase or condemnation in the manner provided by the law. R.L. 1910, § 1397.

(28) 3 Okl. Stats. 1971 Official Ed., p 3986 [64 Okl. St. Ann. § 1, p 289]

§ 52. Purchasing or taking realty

Any railroad corporation may purchase and use real property for a price to be agreed upon with the owners thereof; or the damages to be paid by such corporation for any real property taken as aforesaid, when not agreed upon, shall be ascertained and determined as hereinafter provided. R.L. 1910, § 1399.

(29) 3 Okl. Stats. 1971 Official Ed., p 3986

§ 53. Taking by eminent domain—Commissioners—Appointment and proceedings—Right to construct road.—If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this state, may desire to locate its road, shall refuse to grant the right-of-way through and over his premises, the district judge of the county in which said real property may be situated shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, either by personal service or by leaving a copy thereof at his usual place of residence with some member of his family over fifteen (15) years of age, or, in case of his nonresidence in the state, by such publication in a newspaper as the judge may order, direct the sheriff of said county to summon three disinterested freeholders to be selected by said judge as commissioners, and who must not be interested in a like question. The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of said railroad, and they shall assess the damages which said owner will sustain by such appropriation of his land, irrespective of any benefits from any improvement proposed, and they shall forthwith make report in writing to the clerk of the said court, setting forth the quantity, boundaries, and value of the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk, and a certified copy thereof may be transmitted to the register of deeds of the county where the land lies, to be by him filed and recorded (without further acknowledgment or proof) in the same manner and with like force and effect as is provided for the record of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road,

pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises. R.L. 1910, § 1400; Laws 1971, c. 33, § 1. Operative Jan. 1, 1972.

(30) 3 Okl. Stats. 1971 Official Ed., p 3988 [64 Okl. St. Ann. § 1, p 312]

§ 54. Compensation, accrual of right to

When possession is taken of property condemned, as provided herein, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of said compensation. R.L. 1910, § 1401.

(31) 3 Okl. Stats. 1971 Official Ed., p 3988 [64 Okl. St. Ann. § 1, p. 51 pock. part]

§ 55. Review of commissioners' report—Jury trial—Notice

(A) The report of the commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisement on good cause shown; or either party may within sixty (60) days after the filing of such report file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, all costs in the district court may be taxed against him.

(B) Within ten (10) days after the report of commissioners is filed, the court clerk shall forward to the attorney of record for the condemnor, the attorney of record for each condemnee, and to all unrepresented condemnees, a copy of the commissioners' report and a notice stating the time limits for filing an exception or demand for jury trial as specified in paragraph (A) of this Section. This notice shall be on a form prepared by the Court Administrator, which shall be approved by the Supreme Court, and shall be distributed to all clerks of the district court by said Court Administrator. If a party has been served by publication, the clerk shall forward a copy of the report of commissioners and notice of time limits for filing an exception or demand for jury trial to the last known mailing address, if any, and shall cause a copy of the notice of time limits to be published in one (1) issue of a newspaper qualified to publish legal notices, as defined in 25 O.S. Supp. 1969, § 106. After issuing the notices provided herein, the court clerk shall endorse on the notice form filed in the case, the date and that a copy of the report together with the notice was mailed to each party or his attorney of record, or the date the notice was published in compliance with the provisions hereof.

(C) The time limits for filing an exception and demand for jury trial, as prescribed in paragraph (A) of this Section, shall be calculated from the date the report of the commissioners is filed in the case. On failure of the court clerk to give notice within the time prescribed in paragraph (B) of this Section, the court, on application of any party, may extend the time for filing an exception to the report or a demand for trial by jury for a period not to exceed twenty (20) days from the date the application is heard.

R.L. 1910, § 1402; Laws 1961, p. 497, § 1; Laws 1970, c. 322, § 1, eff. Jan. 1, 1971.

APPENDIX B

FILED
HUGHES COUNTY
MAY 4 - 1973
LOIS MERCHANT, Court Clerk
By [signature illegible]
DEPUTY

IN THE DISTRICT COURT OF HUGHES COUNTY
STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Plaintiff,	)	
vs.	)	No. C 73-93
HUBERT DOUGLASS, JR., et al., Defendants.	)	

PRELIMINARY FINDINGS & ORDER

This matter comes on for hearing on the 4th day of May, 1973 and upon due consideration of the Petition filed herein and being well and sufficiently informed and advised, the undersigned District Judge finds:

1. That Transok Pipe Line Company, an Oklahoma corporation, is a natural gas public utility as defined by 52 O.S. 36.1 and has been granted the power of eminent domain by the Statutes of the State of Oklahoma.

2. That heretofore the Corporation Commission of the State of Oklahoma in Cause CD 35868 entered its Order No. 96291 in which said Commission found that the Channel Booch formation underlying all of the following described lands:

[Description of lands omitted]

was suitable for the underground storage of natural gas and that the use of same by Transok Pipe Line Company is in the public interest.

3. That the said Order No. 96291 is the "Certificate" required by 52 Oklahoma Statute 36.4 to be obtained as a condition precedent to the filing of a Petition in condemnation.

4. That it is necessary for Transok Pipe Line Company, in the proper discharge of its duties as a natural gas public utility and in connection with its lawful purposes, to utilize the Channel Booch formation for the underground storage of gas for so long as said formation is so used, and such portion of the surface as is reasonably necessary in connection therewith, including the right of ingress and egress for the purpose of injecting, storing and removing said gas as to the lands more particularly described in the Petition filed herein and located in Section 21, Township 8N, Range 11E, Hughes County, Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that Transok Pipe Line Company has the power and right of eminent domain to condemn the Channel Booch formation for use in the underground storage of natural gas for so long as such formation is so used, and such use of the surface as is reasonably necessary in connection therewith, including the right of ingress and egress, for the purpose of injecting, storing and removing said gas as to the lands more particularly described in the Petition filed herein and located in Section 21, Township 8N, Range 11E;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that an agent of the Plaintiff or a sheriff of the county of residence of those Defendants who are residents of the State of Oklahoma, make service of notice of the hearing of said Petition on those Defendants by personal service or by leaving a copy thereof at each party's residence with a member of his family, over 15 years of age, at least ten (10) days prior to the date of said hearing and file his return with the Court Clerk in this proceeding; or, if any party in interest be a non-resident of the State of Oklahoma, notice shall be published in one issue of a newspaper of general circulation in Hughes County, Oklahoma,

qualified to publish legal notices, at least 10 days prior to the date of the hearing, and a copy of such notice and of the Petition of the Plaintiff herein shall be duly mailed to any such non-resident party at his or her last known place of residence within 2 days after the date of said publication; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that a hearing will be had at the County Courthouse in Holdenville, Oklahoma on the 31st day of May, 1973 at 10:00 a.m. to appoint Commissioners who will assess the damages.

s/ Bob Howell
Judge of the District Court

[Identical orders filed in No. 73-94 (T.C.) 48,055 (S.Ct.) and No. 73-95 (T.C.) 48,056 (S.Ct.) are included by reference only.]

FILED
HUGHES COUNTY
AUG 11 1973
LOIS MERCHANT, Court Clerk
By Lois Merchant
DEPUTY

IN THE DISTRICT COURT IN AND FOR
HUGHES COUNTY, STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, A corporation, Plaintiff,	)	
-vs-	)	No. C-73-93
MAXWELL DARKS, Defendant.	)	

ORDER

On the 7th day of June, 1973, there came on for hearing the several motions of defendant, Maxwell Darks, pursuant

to regular setting, Plaintiff appearing by its attorneys, Charles B. Crane and J. C. Daugherty, and the Defendant appearing by his attorney Carl Michael Smith. The Court, heard argument of counsel and received evidence with respect to Defendants Motion To Dismiss, Motion To Set Aside Appointment of Appraisers, Motion To Appoint Advisory Engineers, Amended Election to Participate, and Special Demurrer, and took all of such motions under advisement.

On this 28th day of June, 1973, the Court having considered the argument and evidence heretofore submitted, and being fully advised in the premises, finds that all of the motions and demurrers filed by Defendant above named, should be overruled, with exception allowed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that: Defendants Motion To Dismiss is overruled, exception allowed; Motion To Set Aside Appointment of Appraisers is overruled, exception allowed; Motion To Appoint Advisory Petroleum Engineers is overruled, exception allowed; Amended Election to Participate is overruled, exception allowed; Special Demurrer is overruled, exception allowed.

s/ Rudolph Hargrave
Judge of the District Court

APPROVED AS TO FORM:

Carl Michael Smith, Attorney
for Defendant

s/ Charles B. Crane, Attorney
for Plaintiff

[Identical orders filed in No. 73-94 (T.C.) 48,055 (S.Ct.) and No. 73-95 (T.C.) 48,056 (S.Ct.) are included by reference only.]

FILED
HUGHES COUNTY
NOV - 1 1973
LOIS MERCHANT, Court Clerk
By Lois Merchant
(*Em*)

IN THE DISTRICT COURT IN AND FOR HUGHES COUNTY, STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, An Oklahoma Corporation, Plaintiff,	)	C-73-93
	)	C-73-94
vs.	)	NOS. C-73-95
	)	C-73-96
MAXWELL DARKS, et al, Defendants.	)	C-73-100

ORDER

Now on this 31st day of October, 1973, it being called to the attention of the Court that Subpoenas to take depositions having been issued herein and objections thereto filed, the Court finds that any and all depositions as a result of Subpoenas issued in the above cases should be and the same are hereby cancelled and not to be taken as scheduled on November 2, 1973.

The Court will by further order set said objections and motions for hearing and said requested depositions shall be held in abeyance until further order of this Court.

All parties shall govern themselves accordingly.

s/ Rudolph Hargrave
RUDOLPH HARGRAVE
DISTRICT JUDGE

FILED
HUGHES COUNTY
FEB 14 1974
LOIS MERCHANT, Court Clerk
By *Lois Merchant*
(Em)

IN THE DISTRICT COURT OF HUGHES COUNTY
STATE OF OKLAHOMA

TRANSOK PIPELINE COMPANY Plaintiff	)	
-vs-	)	No. C-73-93
HUBERT DOUGLASS, JR., et al, Defendant	)	

ORDER

NOW on this 11th day of February, 1974, a motion is presented to the court requesting that Defendant, Maxwell Darks, be permitted to withdraw the money paid into the Hughes County Clerk's Office as his respective share of the Commissioner's award in this condemnation action without prejudice to any of his legal rights in this case.

It is therefore, ORDERED, ADJUDGED AND DECREED by this court that the Defendant Maxwell Darks be and hereby is permitted to withdraw the money paid into the Hughes County Court Clerk's office as his respective share of the Commissioner's award in this cause without prejudice to any of his legal rights in this case and the clerk of this court is so directed.

s/ Rudolph Hargrave
JUDGE OF THE DISTRICT COURT

[Identical orders filed in No. 73-94 (T.C.) 48,055 (S.Ct.) and No. 73-95 (T.C.) 48,056 (S.Ct.) are included by reference only.]

FILED
HUGHES COUNTY
Oct. 31, 1974
LOIS MERCHANT, Court Clerk
By *Lois Merchant*

IN THE DISTRICT COURT IN AND FOR
HUGHES COUNTY, OKLAHOMA

TRANSOK PIPE LINE COMPANY a corporation, PLAINTIFF,	)	
vs	)	CAUSE NO. C-73-93
MAXWELL DARKS, DEFENDANT.	)	

TEMPORARY RESTRAINING ORDER

This matter coming on for hearing before the undersigned District Judge in and for the above named Court, upon the application and affidavit of the plaintiff by and through its attorney of record, and it appearing to the Court that upon the facts alleged in said application the plaintiff is entitled to the relief prayed for, and it further appearing that the said plaintiff will suffer irreparable damage and harm and injury unless the said defendant is enjoined and restrained forthwith and without notice: IT IS HEREBY ORDERED AND ADJUDGED that the said defendant, Maxwell Darks, his agents, servants, and all persons acting by or under his authority be, and they are hereby enjoined and restrained from carrying out the written threats of defendant conveyed to plaintiff, from interfering with the plaintiff, its employees, agents, and servants in connection with their employment on behalf of this plaintiff, and from preventing the plaintiff through its employees, agents and servants from going upon the land described in the petition on file herein and carrying out their legitimate duties thereon until the further order of this Court.

IT IS FURTHER ORDERED that the application of plaintiff for a permanent injunction is hereby set for hearing at 10:00 o'clock A.M., on the 24th day of October, 1974, at the District Court room in the City of Holdenville, County of Hughes, and that notice thereof be given to the said defendant at least 5 days prior to said hearing.

s/ Rudolph Hargrave
Judge of the District Court

SHERIFF'S RETURN

STATE OF OKLAHOMA,
OKLAHOMA COUNTY, SS.

[Acknowledgment of Summons not served on Maxwell Darks by Joe B. Ray, Deputy. No date appears thereon. General text of the Summons omitted.]

I, LOIS MERCHANT, Court Clerk for Hughes County, Oklahoma, hereby certify that the foregoing, is a true, correct, and complete copy of the instrument herewith set out as appears of Record in the Court Clerk's Office of Hughes County, Oklahoma

This 3rd day of March, 1975

s/ Lois Merchant, Court Clerk
By Deputy

[Identical orders filed in No. 73-94 (T.C.) 48,055 (S.Ct.) and No. 73-95 (T.C.) 48,056 (S.Ct.) are included by reference only.]

FILED
HUGHES COUNTY
NOV 22 1974
LOIS MERCHANT, Court Clerk
By *Lois Merchant*
(Em)

IN THE DISTRICT COURT WITHIN AND FOR
HUGHES COUNTY, STATE OF OKLAHOMA

TRANSOK PIPELINE CO., PLAINTIFF,	)	
VS.	)	No. C-73-93
HUBERT DOUGLAS, JR., ET AL., DEFENDANTS.	)	

ORDER

Now on this 21st day of November, 1974, the Court having on October 24, 1974, heard several matters pending in the above cause and after taking said matters under advisement and careful consideration of all of the pleadings together with statements of counsel and the law, no evidence having been presented, finds as follows:

(1) Defendant's election to participate overruled.

(2) Defendant's motion to set aside appointment of appraisers overruled.

(3) Defendant's request for competitive bidding overruled.

(4) Defendant's amended exceptions to report of commissioners overruled.

(5) Defendant's motion to dismiss and request for permanent injunction overruled.

(6) Defendant's motion to dismiss overruled.

(7) Plaintiff's motion to strike motion to dismiss sustained.

(8) Defendant's motion for memorandum of interest sustained insofar as any prepared information setting out interest of ownership in the hands of the plaintiff which may be furnished for the Court's benefit in determining the interest herein.

(9) Defendant's exception to commissioners report overruled.

(10) Plaintiff's motion to approve report of commissioners and to confirm taking in condemnation is sustained.

(11) Defendant's application for temporary restraining order and injunction overruled.

(12) Plaintiff's exceptions and objections to commissioners report are denied and in this connection, the Court specifically finds that the partial dismissal filed by the plaintiff is ineffectual and that the defendant, Harry H. Diamond Inc., is a necessary party to these proceedings.

(13) The Court further orders the plaintiff to deposit with the Court Clerk of Hughes County, Oklahoma, the amount of damages as set out by the commissioners in their report in favor of the defendant, Harry H. Diamond, Inc., within 20 days from this date.

The Court is instructed to make a minute reflection of these rulings and allowing each side exceptions to the Court's rulings.

s/ Rudolph Hargrave
RUDOLPH HARGRAVE
DISTRICT JUDGE

(Orders in No. 93-94 (48,055 (S.Ct.) and No. 93-95 (48,056 S.Ct.) are identical in (1) through (11) and for this reason they are included herein by reference only)

FILED
COURT OF APPEALS
STATE OF OKLAHOMA
AUG 3 1976
ROSS N. LILLARD, JR.
CLERK

IN THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA
(Division No. 1)

MAXWELL DARKS, Appellant, vs. TRANSOK PIPE LINE COMPANY, Appellee.	No. 48,054	Consolidated as No. 48,054
	48,055	
	48,056	

APPEAL FROM THE DISTRICT COURT OF
HUGHES COUNTY, OKLAHOMA
HONORABLE RUDOLPH HARGRAVE, JUDGE

REVERSED AND REMANDED WITH DIRECTIONS

Robert G. Grove
Carl Michael Smith
Oklahoma City, Oklahoma, For Appellant,

Robert L. Lawrence
Kenneth W. East
Kevin M. Abel
Tulsa, Oklahoma, For Appellee.

ROMANG, J.:

By order dated August 25, 1975, the Oklahoma Supreme Court ordered the above three cases "consolidated for all purposes to be presented on a single record on appeal, and briefs common to each of the causes."

This is a condemnation proceeding to obtain underground storage for natural gas. The condemnor, Transok Pipe Line Company, is a "natural gas public utility" as defined by 52 O.S. 1971, § 36.1. These condemnation cases were brought after first obtaining from the Oklahoma Corporation Commission a certificate as provided by 52 O.S. 1971, § 36.4. A correction certificate was later issued, and a copy of it was attached to each petition for condemnation. These condemnation actions were brought pursuant to 52 O.S. 1971, § 36.1 et seq. and 66 O.S. 1971, § 51 et seq. The formation condemned is known as the Channel Booch Sands which extend under an area of approximately 3,660 acres in Hughes County.

The District Court appointed commissioners as provided by statute, and the commissioners filed their report setting the value of what was being taken. The appellant owner, Maxwell Darks, filed exceptions to the report of the commissioners. This appeal is from the order overruling appellant's exceptions to the commissioners' report.

Transok filed a motion to dismiss this appeal which was overruled by the Oklahoma Supreme Court. Transok has renewed its Motion to Dismiss which is based on the fact that appellant obtained leave of the Oklahoma Supreme Court to amend his petition in error by interlineation, but instead, waited six months and then amended it in substance. The amendment was made before the appellant's brief in chief was filed. Rule 1.17 of the Rules—Civil Appellate Procedure, reads as follows:

> "(a) TIME AND EXTENT OF AMENDMENT. The petition in error may be amended at any time before brief in chief is filed, or thereafter by leave of court, to include any error or any issue presented to and resolved by the trial court which is supported by the record. . . . ."

In view of the above rule, Transok's renewed motion to dismiss is hereby denied.

Appellant presents as his first proposition for reversal the following:

> "The trial court refused to dismiss appellee's action for lack of jurisdiction."

In support thereof, appellant asserts:

> "Appellee neglected to first obtain the required certificate of convenience and necessity from the Federal Power Commission before filing Case No. 35,868 in the Oklahoma Corporation Commission on October 25, 1972. Such certificate is a mandatory requirement under 15 U.S.C., Sec. 717 f (c) before commencing a subsurface gas storage warehouse if appellee is operating in interstate commerce."

In Robinson v. Transcontinental Pipe Line Corp., 306 F.Supp. 201 (N.D. Ga. 1969), the court held that a Certificate of Public Convenience and Necessity was not required by § 717 f (c) before exercising the power of eminent domain under State law. There is nothing in the record before this court that would sustain a finding that Transok is operating in interstate commerce. We hold that Transok was not required to obtain any certificate from the Federal Power Commission.

Appellant next contends that notice was not given as provided by 52 O.S. 1971, § 36.4, and therefore the Oklahoma Corporation Commission did not have jurisdiction to hold a hearing and to issue the certificate required to be attached to the petition as provided by 52 O.S. 1971, § 36.5. Appellant asserts that the notice published for two weeks as provided by § 36.4 was defective because it did not contain the names of the various landowners nor describe the specific ownership in the specific tracts of land. No convincing authority is cited to uphold that argument. Also, we note that the appellant was personally present and participated in the hearing before the Corporation Commission. We fail to see where appellant is in a position to

complain about lack of notice. The Corporation Commission determined that appropriate and proper notice had been given for the certificate hearing. There was no appeal taken in that proceeding. We conclude that the lack of notice contention is without merit.

Appellant further contends that the correction certificate is void on its face for the reason that the original certificate was not attached to Transok's petition in the District Court, and that the correction certificate was materially different from the original certificate. Also, that neither certificate makes a finding of the recoverable native oil or gas as required by 52 O.S. 1971, § 36.4.

In regard to this argument, § 36.4 states that the certificate should set out the amount of recoverable oil and native gas, if any, remaining in the formation.

The correction certificate attached to the petition contains a finding that the Channel Booch Sand underlying the area involved, is a dry gas reservoir, and the volumes of native gas originally in place therein are substantially depleted; that the reservoir is suitable for underground storage of natural gas, and its use for that purpose is in the public interest. We conclude that the correction certificate met statutory requirements, and that its attachment to the petition met the requirement of 52 O.S. 1971, § 36.5.

Appellant's second proposition reads:

> "The trial court erred in its refusal to issue a restraining order to halt the trespass of appellee."

In answer thereto, Transok asserts as follows:

> "The Court has repeatedly held that where the taking corporation, empowered with the right of eminent domain, takes land for public use even without just compensation, the *landowner's exclusive remedy* is in *reverse condemnation*." (Emphasis theirs.)

For the latest pronouncement of the Oklahoma Supreme Court on this subject, see Allen v. Transok Pipe Line Company, 47 OBJ 956 (April 24, 1976).

We now proceed to appellant's third proposition, which reads:

> "66 O.S. Sec. 51 et. seq. violates due process and equal protection of the law in condemnation proceedings for a sub-surface gas storage warehouse."

Appellant's exceptions to the report of the commissioners was timely filed and it contains the following:

> "That when these condemnation cases were filed, immediately District Judge Bob Howell held an ex parte hearing without the defendants being advised or notified in which he entered an order that (1) Transok Pipe Line Company has the right of eminent domain and (2) the fact that said property is necessary and can be condemned by Transok Pipe Line Company purposes, all contrary to law including the defendants right to be present and to contest such order. Further there is no showing in the testimony or record of this case that Transok Pipe Line Company produced any official of the company to testify in this matter. Defendants are entitled to be present and to have the right to cross-examination in such matters relative to the legal right to bring this condemnation and such ex parte hearing violates the defendants due process rights under the 5th Amendment and the 14th Amendment of the United States Constitution."

The above allegations stand uncontroverted.

The trial court held no hearing after the filing of said exceptions to determine the question of the necessity of taking. This failure constituted a denial of procedural due process as well as a denial of due process from a substantive standpoint. Appellant was entitled to an adversary hearing after reasonable notice. The failure to afford such hearing

constitutes reversible error, and renders void all proceedings which transpired in these cases after the exceptions were filed.

In Board of County Com'rs of Creek County v. Casteel, 522 P.2d 608 (Okla. 1974), the court said:

> "The fact that the landowners have a constitutional right to be heard on the necessity of the taking is unquestioned."

The Order overruling appellant's "Exceptions to Commissioners' Report" is hereby reversed and this case is remanded with direction for the trial judge to hold an adversary hearing on said exceptions after the giving of reasonable notice to the parties involved, and then proceed as provided by law.

REVERSED AND REMANDED WITH DIRECTIONS.

BOX, J. concurs.

FILED
COURT OF APPEALS
OCT 4 1976

IN THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA
(Division No. 1)

MAXWELL DARKS, Appellant,	)		
vs.	)	No. 48,054	Consolidated
	)	48,055	as No. 48,054
TRANSOK PIPE LINE COMPANY,	)	48,056	
Appellee.	)		

ORDER

This Court having considered the Appellant's Petition for rehearing together with the briefs in connection therewith, and having heard oral argument at the Appellant's

request, finds that the opinion adopted herein on August 3, 1976, should be, and the same is hereby withdrawn, and in place thereof, the attached opinion is hereby adopted.

The parties hereto are granted 15 days from the filing date of this substitute opinion in which to file Petitions for Rehearing.

DONE IN CONFERENCE This 4th day of October, 1976.

s/ Lester A. Reynolds
LESTER A. REYNOLDS, Presiding Judge

IN THE COURT OF APPEALS
OF THE STATE OF OKLAHOMA
(Division No. 1)

MAXWELL DARKS, Appellant,	)		
vs.	)	No. 48,054	Consolidated
	)	48,055	as No. 48,054
TRANSOK PIPE LINE COMPANY,	)	48,056	
Appellee.	)		

APPEAL FROM THE DISTRICT COURT OF
HUGHES COUNTY, OKLAHOMA
HONORABLE RUDOLPH HARGRAVE, JUDGE

AFFIRMED

Robert G. Grove
Carl Michael Smith
Oklahoma City, Oklahoma, For Appellant,

Robert L. Lawrence
Kenneth W. East
Kevin M. Abel
Tulsa, Oklahoma, For Appellee.

ROMANG, J.:

By order dated August 25, 1975, the Oklahoma Supreme Court ordered the above three cases "consolidated for all purposes to be presented on a single record on appeal, and briefs common to each of the causes."

This is a condemnation proceeding to obtain underground storage for natural gas. The condemnor, Transok Pipe Line Company, is a "natural gas public utility" as defined by 52 O.S. 1971, § 36.1. These condemnation cases were brought after first obtaining from the Oklahoma Corporation Commission a certificate as provided by 52 O.S. 1971, § 36.4. A correction certificate was later issued, a copy being attached to each petition for condemnation. These condemnation actions were brought pursuant to 52 O.S. 1971, § 36.1 et seq. and 66 O.S. 1971, § 51 et seq. The formation condemned is known as the Channel Booch Sands, which extend under an area of approximately 3,660 acres in Hughes County.

The District Court appointed commissioners as provided by statute, and the commissioners filed their report setting the value of what was being taken. The appellant owner, Maxwell Darks, filed exceptions to the report of the commissioners. This appeal is from the order overruling appellant's exceptions to the commissioners' report.

Transok filed a motion to dismiss this appeal which was overruled by the Oklahoma Supreme Court. Transok has renewed its Motion to Dismiss, which is based on the fact that appellant obtained leave of the Oklahoma Supreme Court to amend his petition in error by interlineation, but instead, waited six months and then amended it in substance. The amendment was made before the appellant's brief in chief was filed. Rule 1.17 of the Rules—Civil Appellate Procedure, reads as follows:

> "(a) TIME AND EXTENT OF AMENDMENT. The petition in error may be amended at any time before brief in chief is filed, or thereafter by leave of court, to include any error or any issue presented to and resolved by the trial court which is supported by the record, ..."

In view of the above rule, Transok's renewed motion to dismiss is denied.

Appellant presents as his first proposition for reversal the following:

> "The trial court refused to dismiss appellee's action for lack of jurisdiction."

In support thereof, appellant asserts:

> "Appellee neglected to first obtain the required certificate of convenience and necessity from the Federal Power Commission before filing Case No. 35,868 in the Oklahoma Corporation Commission on October 25, 1972. Such certificate is a mandatory requirement under 15 U.S.C., Sec. 717 f (c) before commencing a sub-surface gas storage warehouse if appellee is operating in interstate commerce."

In Robinson v. Transcontinental Pipe Line Corp., 306 F.Supp. 201 (N.D. Ga. 1969), the court held that a Certificate of Public Convenience and Necessity is not required by § 717 f (c) before exercising the power of eminent domain under State law. There is nothing in this record that would sustain a finding that Transok is operating in interstate commerce. We hold that Transok was not required to obtain any certificate from the Federal Power Commission.

Appellant next contends that notice was not given as provided by 52 O.S. 1971, § 36.4, and therefore the Oklahoma Corporation Commission did not have jurisdiction to hold a hearing and to issue the certificate required to be attached to the petition as provided by 52 O.S. 1971, § 36.5.

Appellant asserts that the notice published for two weeks as provided by § 36.4 was defective because it did not contain the names of the various landowners nor describe the specific ownership in the specific tracts of land. No convincing authority is cited to uphold that argument. Also, the appellant was personally present and participated in the hearing before the Corporation Commission. Appellant is in no position to complain about lack of notice. The Corporation Commission determined that appropriate and proper notice had been given for the certificate hearing. There was no appeal taken in that proceeding. The lack of notice contention is without merit.

Appellant further contends that the correction certificate is void on its face for the reason that the original certificate was not attached to Transok's petition in the District Court, and that the correction certificate was materially different from the original certificate. Also, that neither certificate makes a finding of the recoverable native oil or gas as required by 52 O.S. 1971, § 36.4.

In regard to this argument, § 36.4 states that the certificate should set out the amount of recoverable oil and native gas, if any, remaining in the formation.

The correction certificate attached to the petition contains a finding that the Channel Booch Sand underlying the area involved, is a dry gas reservoir, and the volumes of native gas originally in place are substantially depleted; that the reservoir is suitable for underground storage of natural gas, and its use for that purpose is in the public interest. We conclude that the correction certificate met statutory requirements, and that its attachment to the petition met the requirements of 52 O.S. 1971, § 36.5.

Appellant's second proposition reads:

"The trial court erred in its refusal to issue a restraining order to halt the trespass of appellee."

In Allen v. Transok Pipe Line Company, 47 OBJ 956 (April 24, 1976), the opinion reads:

> ". . . [A] public utility invested by law with the power to exercise the right of eminent domain is not thereby clothed with an immunity not possessed by others who trespass upon the property or rights of private citizens, and must answer for its wrongs the same as any other trespasser.
>
> "We, therefore, hold Appellant has a separate and distinct cause of action in trespass for damages and for punitive damages. However, in those cases in which the landowner elects to sue in tort, the defendant pipeline company can cross-petition for condemnation, and the two causes of action can be tried in the same case.
>
> "In other cases where the landowner thinks the trespasser could have exercised the power of eminent domain, he can recover in one lawsuit all damages sustained as a result of the trespasser's willful and wanton conduct, as well as damages in reverse condemnation, by setting forth in the same suit two separate causes of action, the first based on trespass to recover his damages and for punitive damages, and, second, a separate cause of action under the reverse condemnation statute.
>
> * * * * * *
>
> "In the case of Peckham et al. v. Atchison T. & S.F. Ry. Co., et al., 212 Pac. 427 (Okl. 1923), we said in the first syllabus:
>
> " 'Where a public service corporation, vested with the power of eminent domain, enters into actual possession of land necessary for its corporate purposes, with or without the consent of the owner, and the owner remains inactive, stands by and permits such corporation to go on and spend large sums of money in constructing its railroad, or telegraph wires, or

> pipe lines, or mains, or plants or other necessary fixtures, the owner is estopped from maintaining either trespass or ejectment, and will be regarded as having acquiesced therein, * * * ' "

In the instant case there is an adequate remedy at law, so the defendant would not be entitled to a restraining order even if a trespass did occur. Tulsa Rock Co. v. Board of County Commissioners of Rogers County, 531 P.2d 351 (Okla. 1975).

Appellant's third proposition reads:

> "66 O.S. Sec. 51 et seq. violates due process and equal protection of the law in condemnation proceedings for a sub-surface gas storage warehouse."

To sustain this proposition, appellant relies principally upon the cases of Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556, 93 S.Ct. 1983 (1972), and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975). The Fuentes case involved replevin statutes in the States of Florida and Pennsylvania, while the North Georgia case involves the garnishment of a bank account in the State of Georgia.

The United States Supreme Court case most directly in point that has come to our attention, is that of Bailey v. Anderson, 326 U.S. 203, 90 L.Ed. 3, 66 S.Ct. 66 (1945). The State Highway Commissioner of Virginia brought the action under the Virginia Code to condemn appellant's land for use as a public highway. Appellee entered on the land and constructed the highway in advance of condemnation. In the opinion the United States Supreme Court said:

> ". . . But it has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard

> and to offer evidence as to the value of the land taken. . . . Its value may be fixed by viewers without a hearing, after entry upon the land, if their award is subject to a review in which a trial upon evidence may be had.
>
> * * * * * *
>
> ". . . Their award is made subject to judicial review by § 1969j(2), and upon such review may be set aside if plainly wrong or without support in the evidence. . . . In this we find no denial of due process, and appellant's contention presents no substantial constitutional question, as the authorities cited show."

In Pryor v. Western Paving Co., 184 Pac. 88 (Okla. 1919), the court syllabus states:

> "By 'due process of law' is meant an orderly proceeding, adapted to the nature of the case, before a tribunal having jurisdiction, which proceeds upon notice, with an opportunity to be heard, with full power to grant relief.
>
> "The Fourteenth Amendment to the federal Constitution is not a limitation upon the rights of the several states exercising such powers as are political and legislative in their nature, and does not control the procedure affecting the rights of citizens, so long as the fundamental principles which inhere in due process of law are observed."

And in the opinion the court said:

> ". . . Due process of law must be understood to mean law in the regular course of administration through tribunals, according to those rules and forms which have been established for the protection of private rights and the prevention of injustice and wrong.
>
> * * * * * *

"While ordinarily the constitutional requirement as to due process of law implies a formal judicial proceeding, it is, however, well settled that this is not indispensable to such a proceeding. It is not a denial of due process of law for commissioners and boards to exercise administrative powers when executing statutory enactment affecting the rights of citizens, so long as they observe the fundamental principles which inhere in due process of law."

In Board of County Com'rs of Creek County v. Casteel, 522 P.2d 608 (Okla. 1974), the Oklahoma Supreme Court held:

". . . Only an objection to the report of the commissioners meets the statutory requirement necessary for bringing forth the issue of the necessity of the taking. 66 O.S. 1971, § 55.

* * * * * *

". . . The procedural requirements set forth for condemnation cases in the statutes are reasonable and must be complied with. The landowner waived his right to a hearing on the necessity of the taking when he did not object to the report of the commissioners within the statutorily prescribed time."

The landowner in the instant case filed exceptions to the report of the commissioners within the statutorily prescribed time, but failed to *specifically* request a hearing on the necessity of the taking, so his right thereto was waived.

We find that 52 O.S. 1971, § 36.1 et seq., and 66 O.S. 1971, § 51 et seq., are constitutional, and that none of the three propositions presented, have any merit.

AFFIRMED.

REYNOLDS, P.J. and BOX, J. concur.

FILED
COURT OF APPEALS
STATE OF OKLAHOMA
NOV 23 1976
ROSS N. LILLARD, JR.
CLERK

IN THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA
(Division No. 1)

MAXWELL DARKS, Appellant,	)	
vs.	)	No. 48,054
TRANSOK PIPE LINE COMPANY, Appellee.	)	

ORDER

The Appellant having filed a Second Petition for Rehearing, and the Appellee having filed a Motion to Dismiss said Second Petition for Rehearing, it is hereby ordered, adjudged and decreed as follows:

Appellee's Motion to Dismiss is overruled, and Appellant's Second Petition for Rehearing is denied.

DONE IN CONFERENCE This 23rd day of November, 1976.

s/ Lester A. Reynolds
LESTER A. REYNOLDS, Presiding Judge

FILED
SUPREME COURT
STATE OF OKLAHOMA
NOV 16, 1977
ROSS N. LILLARD, JR.
CLERK

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Wednesday, Nov. 16, 1977

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

48,054
48,055 Consolidated under 48,054. Maxwell Darks v.
48,056 Transok Pipeline Co. Certiorari denied.

APPENDIX C

FILED
MARCH 5, 1973

BEFORE THE CORPORATION COMMISSION OF
THE STATE OF OKLAHOMA

APPLICATION OF TRANSOK PIPE LINE COMPANY PURSUANT TO 52 O.S. 36.1 et seq. FOR A CERTIFICATE DECLARING THAT THE CHANNEL BOOCH FORMATION UNDERLYING NE/4 NE/4 SECTION 2. N/2 N/2 SECTION 1, TOWNSHHIP 7N, RANGE 10E; E/2 SE/4 AND SE/4 NE/4 SECTION 35, S/2 AND NE/4 AND S/2 S/2 NW/4 SECTION 36, TOWNSHIP 8N, RANGE 10E; SW/4 AND N/2 N/2 SE/4 AND N/2 SECTION 31; S/2 SW/4 AND SE/4 SECTION 30; N/2 NW/4 AND N/2 S/2 NW/4 AND N/2 N/2 NE/4 SECTION 32; S/2 AND NE/4 AND S/2 NW/4 AND NE/4 NW/4 SECTION 29; N/2 AND NW/4 SE/4 AND N/2 SW/4 AND N/2 S/2 SW/4 SECTION 28; S/2 SW/4 SE/4 AND SE/4 SE/4 SECTION 20; S/2 AND NE/4 AND SE/4 NW/4 SECTION 21; W/2 W/2 SECTION 22; W/2 NW/4 SECTION 27, TOWNSHIP 8N, RANGE 11E, HUGHES COUNTY, OKLAHOMA ARE SUITABLE FOR UNDERGROUND STORAGE OF NATURAL GAS AND THAT ITS USE FOR SUCH PURPOSES IS IN THE PUBLIC INTEREST.	) CAUSE CD NO. 35868) ORDER NO. 96291

REPORT OF THE COMMISSION
ORDER CORRECTING ORDER NO. 95952

This cause came on for hearing before R. F. Thweatt, Trial Examiner for the Corporation Commission of Okla-

homa, on the 16th day of January, 1972, in the Commission's courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission, for the purpose of taking testimony and reporting to the Commission.

At the time of the hearing, Mr. Roger R. Scott, Attorney, and Mr. Charles B. Crane, Attorney, appeared for the applicant, *Transok Pipe Line Company*; Mr. William C. Majors appeared for Diamond L., Inc., and Mrs. James Logan; Mr. Maxwell Darks, Attorney, Hubert Douglas, Jr., Miller D. Jones, Ernest Allen, Ms. Elizabeth Star, Bert Wininger Beaden Hope, and Ms. Frances Wood appeared for themselves. Mr. Harvey Cody, Conservation Attorney, appeared for the Commission.

The Trial Examiner heard the cause and filed his report recommending that the application be granted; time was allowed within which exceptions might be filed to said report, and none having been filed, the Commission being in executive session and being fully advised in the premises, therefore finds as follows:

FINDINGS

1. That this is an application of Transok Pipe Line Company for a certificate declaring that the Channel Booch Formation underlying NE/4 NE/4 Section 2, N/2 N/2 Section 1, Township 7N, Range 10E; E/2 SE/4 and SE/4 NE/4 Section 35, S/2 and NE/4 and S/2 S/2 NW/4 Section 36, Township 8N, Range 10E; SW/4 and N/2 N/2 SE/4 and N/2 Section 31; S/2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S/2 NW/4 and N/2 N/2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N/2 SW/4 and N/2 S/2 SW/4 Section 28; S/2 SW/4 SE/4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE/4 NW/4 Section 21; W/2 W/2 Section 22; W/2 NW/4 Section 27, Township 8N, Range 11E; Hughes County, Oklahoma, are suitable for underground storage of natural gas and that its use for such purpose is in the public interest.

2. That the Commission has jurisdiction over the subject matter herein and no protests have been entered to the granting of the application.

3. That the applicant, Transok Pipe Line Company, is an Oklahoma corporation engaged in the business of transporting and transmitting natural gas by pipeline within the State of Oklahoma for ultimate public use, and qualifies as a natural gas public utility as defined in 52 Okla. Statutes 36.1.

4. That the Channel Booch Sand underlying the NE/4 NE/4 Section 2, N/2 N/2 Section 1, T7N, R10E; E/2 SE/4 and SE/4 NE/4 Section 35, S/2 and NE/4 and S/2 S/2 NW/4 Section 36, T8N, R10E, SW/4 and N/2 N/2 SE/4 and N/2 Section 31; S2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S/2 NW/4 and N/2 N/2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N/2 SW/4 and N/2 S/2 SW/4 Section 28; S/2 SW/4 SE/4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE/4 NW/4 Section 21; W/2 W/2 Section 22; W/2 NW/4 Section 27, T8N, R11E, Hughes County, Oklahoma, is a dry gas reservoir, and the volumes of native gas originally in place therein are substantially depleted.

5. That the reservoir which is sought to be used for the underground storage of natural gas is ideally suited for such purpose and has a greater value or utility as a gas storage reservoir for the purpose of insuring an adequate supply of natural gas for applicant's consumers and for the conservation of natural gas, than for the production of the relatively small volumes of native gas which remain therein, and that such storage of gas is necessary to permit the orderly withdrawal of natural gas at periods of peak demand so as to make more readily available the natural gas reserves of the State of Oklahoma to the consumers of this State; will provide a better year-round market to the various gas fields within the area; will promote the public interest and welfare of the State of Oklahoma; will prevent

waste and protect the correlative rights of mineral owners, and is in the public interest.

6. That the Channel Booch Sand underlying the properties described in the application may be reasonably expected to be penetrated by gas displaced or injected into the proposed gas storage reservoir.

7. That no gas from said Booch Sand formation is being used for the secondary recovery of oil.

8. That said Booch Sand formation is not being used by others for the injection, storage, and withdrawal of natural gas in the area of the lands above described; that 2 BCF of native natural gas remains in the reservoir.

9. That the Channel Booch formation aforementioned in this application is identified by the log on the Adelman No. 1-B Well, located in the center of the NW/4 NW/4 of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2496 feet and a base at approximately 2556 feet.

10. That due to inadvertence and oversight when Order No. 95952 was prepared the Channel Booch Sand, though named, was not identified as to depth or as to a previously drilled well log in the reservoir area, and this Correction Order is being issued to correctly reflect the testimony at the time of the hearing.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of the State of Oklahoma as follows:

1. That the application of Transok Pipe Line Company for a certificate declaring the Channel Booch Formation underlying the

NE/4 NE/4 Section 2; N/2 N/2 Section 1, Township 7N, Range 10E; E/2 SE/4 and SE/4 NE/4 Section 35; S/2 and NE/4 and S/2 S/2 NW/4 Section 36, Township 8N, Range 10E; SW/4 and N/2 N/2 SE/4 and N/2 of Section 31; S/2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S/2 NW/4 and N/2 N/2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N/2 SW/4 and N/2 S/2 SW/4 Section 28; S/2 SW/4 SE/4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE/4 NW/4 Section 21; W/2 W/2 Section 22; W/2 NW/4 Section 27, Township 8N, Range 11E, Hughes County, Oklahoma.

are suitable for underground storage of natural gas, and that its use for such purposes is in the public interest, and that said application be, and the same is by this order granted.

2. That said Channel Booch formation is identified by the log on the Adelman No.1-B well located in the center of the NW/4 NW/ of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2496 feet and a base of approximately 2556 feet and that such stratum or formation is suitable for the underground storage of natural gas. That the evidence in this cause shows that there are approximately 2 BCF of native gas remaining in this reservoir.

3. That Transok Pipe Line Company is authorized and empowered to use and operate the Channel Booch Sand underlying the described lands for the purpose of underground storage of natural gas, all in accordance with and subject to the limitations of 52 Okla. Statutes 36.1 et seq.

4. That applicant, Transok Pipe Line Company, will be the owner of all natural gas injected into the said Booch Sand Formation underlying the above-described lands, and no person other than said applicant shall have the right to produce, take, reduce to possession, waste, or otherwise interfere with, or exercise any control over such gas; provided however that the owner of said lands, or of other

rights or interests therein shall have the right to drill through said formation in such manner as shall protect said formation against pollution and the escape of natural gas therefrom, and in accordance with such orders, rules and regulations as the Commission may make for the protection of such underground storage.

5. That this Order should be and is hereby declared to be the Certificate required by 52 O.S. 1961, Sec. 36.4, as a condition precedent to the filing of the application or petition for condemnation of Transok Pipe Line Company in the courts of the State of Oklahoma.

DONE AND PERFORMED this 5th day of March, 1973.

CORPORATION COMMISSION OF OKLAHOMA

s/ Charles Nesbitt
Charles Nesbitt, Chairman

Ray C. Jones, Vice Chairman

s/ Rex Privett
Rex Privett, Commissioner

ATTEST:

s/ Ed Overholser
Ed Overholser, Secretary

(This certificate attached to petition in all condemnation cases appealed herein)

FILED
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA
JULY 24 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Transok Pipe Line Co.,
Plaintiff

vs No. 73-186-C

An EASEMENT, ETC.,
Defendants

ORDER

On this 24th day of July, 1973, . . .

* * * * * *

If the court has overlooked any other objection said Defendant has made the same are without merit as determined at this time.

* * * * * *

It is ordered this 24th day of July, 1973.

Fred Daugherty

Fred Daugherty
United States District Judge

FILED
SUPREME COURT
STATE OF OKLAHOMA
SEP 8 1975
ROSS N. LILLARD, JR.
Clerk

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Transok Pipe Line Company, a corporation, Petitioner	)	
vs.	)	No.'s 48,708
Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	)	& 48,709

ORDER

This matter comes on for hearing upon petitioners' application and petition for Writ of Prohibition against the Hon. Frank Seay, Respondent, seeking to prohibit said District Judge from further proceedings in causes No. C-74-250 & 251 pending in Hughes County, Oklahoma.

It further appearing to this Court that such last mentioned causes of action were filed by the owner of lands sought to be condemned and his alleged partner against the petitioner herein and that they sound in tort (trespass) and seek damages against the real premises and personalty located thereon.

This Court being fully advised in the premises, after hearing argument and for good cause shown, finds that petitioner is entitled to Writs of Prohibition against the Respondent, by virtue of our holdings in Delhi Gas Pipe Line Co. vs. Swanson 520 P.2d 670 (1974); Oklahoma City

vs. Wells 185 Okl. 369, 91 P.2d 1077 (1939); Cities Service Gas Co. vs. Huebner 200 Okl. 521, 197 P.2d 985 (1948) and Graham vs. The City of Duncan 354 P.2d 458 (1960).

WRITS GRANTED.

DONE IN CONFERENCE THIS 8th day of September, 1975, under the superintending control granted this Court, Art. VII § 4 of the Oklahoma Constitution.

s/ Ben T. Williams
Chief Justice

(Orders of the Supreme Court of the State of Oklahoma of December 9, 1975.)

* * * * * *

48,708 Transok Pipe Line Co. v. Frank Seay, Judge. Oral argument and rehearing denied.

48,709 Transok Pipe Line Co. v. Frank Seay, Judge. Oral argument and rehearing denied.

* * * * * *

s/ Ralph P. Hodges
(Acting) Chief Justice

FILED
DEC 31 1975
CHARLES N. HASKELL, Clerk
U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE CO.,)
)
Plaintiff,)
-vs-) No. 73-186-C
)
AN EASEMENT, etc.,)
Defendants.)

ORDER GRANTING PLAINTIFF'S MOTION
FOR NEW TRIAL

* * * * * *

The defendant Darks, in his motion for new trial and in his brief, argues that this court erred in refusing to permit him to introduce evidence concerning damages caused by plaintiff in entering upon Tracts 1 and 2 prior to April 5, 1973. He argues that the Supreme Court of Oklahoma has entered an order prohibiting the prosecution of a separate action brought by him in state court for the recovery of these damages, the court saying that such damages must be recovered by him in connection with the condemnation proceeding. In support of this argument he attaches as Exhibits A and B the orders, pleadings and briefs filed in the Oklahoma Supreme Court. The orders in those cases prohibit the further prosecution of an action filed by defendant Darks in state court on November 26, 1974. The writ of prohibition issued by the Oklahoma Supreme Court in each of two cases was filed on September 8, 1975. Defendant Darks also attaches as Exhibit C an affidavit wherein he sets out the alleged wrongful acts of the plaintiff which presumably form the basis for the action filed by him in state court on November 26, 1974.

Examination of the four cases cited by the Oklahoma Supreme Court in its orders granting writs of prohibition reveals that the court has held that damages which are caused *incident to a taking* in an eminent domain proceeding must be recovered in that proceeding. See *Delhi Gas Pipe Line Co.* v. *Swanson*, 520 P.2d 670 (1974); *Oklahoma City* v. *Wells*, 185 Okl. 369, 91 P.2d 1077 (1939); *Cities Service Gas Co.* v. *Heubner*, 200 Okl. 521, 197 P.2d 985 (1948), and *Graham* v. *The City of Duncan*, 354 P.2d 458 (1960). In each of those cases, however, the damages for which plaintiff seeks to recover occurred in connection with the taking of the land in question. For example, in *Graham* v. *The City of Duncan, supra*, the court noted: ". . . the broomcorn was appropriated by the city in connection with the taking of the land upon which it was grown. . . ." 354 P.2d at 463. Such is not the case here. In this case the taking occurred on October 1, 1973. All of the acts of which defendant Darks complains occurred not in connection with the taking, but in fact occurred some five months *prior to* the taking. The foregoing cases do not stand for the proposition that in such a circumstance all such damages must be recovered in the condemnation action. Furthermore, Exhibits A and B attached to defendant Darks' motion for new trial show that there were pending and are pending in state court several condemnation proceedings with respect to several tracts which make up a part of defendant Darks' ranch. It appears that these condemnation proceedings were instituted in 1973 the takings occurred prior to the taking in this case. The Supreme Court of Oklahoma apparently concluded, in accord with the rule of law announced in the authorities mentioned above, that the action filed by defendant Darks on November 26, 1974, involved damages to land which were caused in connection with one or more of the condemnation proceedings pending in state court, and for that reason it issued the writ of prohibition. The pendency of this case was not mentioned in the Supreme Court's writ or in the pleadings.

For the reasons heretofore stated, the plaintiff's motion for new trial is granted with respect to the surface interests only of defendants Darks and Olivo in Tracts 1, 2 and 6. The defendant Darks' motion for new trial is denied.

ORDERED this 31 day of December, 1975.

s/ Joseph W. Morris
United States District Judge

[Summaries of Interest attached to Order omitted]

FILED
UNITED STATES COURT OF APPEALS, TENTH CIRCUIT
NOV 14 1977
HOWARD K. PHILLIPS, Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 76-1647, 76-1648 and 76-1972

TRANSOK PIPELINE COMPANY, an Oklahoma corporation,

Plaintiff-Appellee,

vs. (D.C. No. 73-186)

MAXWELL DARKS, MARVIN OLIVO, AGNES LUCAS NOW WESLEY,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Oklahoma

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Submitted: September 29, 1977

Andrew Wilcoxen (Kenneth W. East, on the brief), for Plaintiff-Appellee.

Carl Michael Smith and Robert C. Grove for Defendants-Appellants Maxwell Darks and Marvin Olivo.

Gary P. Snow for Defendant-Appellant Agnes Lucas now Wesley.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

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* * * * * *

IV.

Finally, we consider whether the trial court erred in its ruling on the reception of evidence and its instructions.

The underground area sought to be condemned was 2,500 feet beneath the surface that underlay about 3,640 acres in Hughes County, which property was owned by about 25 owners, according to appellants' estimate. Only a part of this formation was considered in this condemnation action. There are related actions in the state court. We see no shortcoming in the trial court's instructions. It fairly defined the standards to be followed in making the award.

As to the evidence:

Appellants offered evidence of the value of the entire formation of the gas storage reservoir. This was apparently on the theory that compensation should amount to a percentage of the total value of the reservoir equal to the defendants' percentage of the surface area over the reservoir. Such a formula would constitute a measure based upon the

value to Transok rather than the value of the property taken. That the latter is now the law in Oklahoma is shown by McInturff v. Oklahoma Natural Gas Transmission Co., 475 P.2d 160 (Okla. 1970); Cases from other states are to the same effect. Home Gas Co. v. Miles, 358 N.Y.S.2d 846 (Sup. Ct. 1974); Midwestern Gas Transmission Co. v. Mason, 201 N.E.2d 379 (Ill. 1964).

Olson v. United States, 292 U.S. 246 (1934), is not relevant because here in contrast to *Olson* there is no possibility of the 25 owners combining to operate a storage facility so as to come within *Olson*. *See* 292 U.S. at 257.

Severance damages were sought based upon diminution in value of the entire ranch. The trial court instructed the jury to disregard this evidence. The court's exclusion of this was justified on the basis that the testimony as to reduction of the value of the entire ranch as a result of this easement was, to say the least, insubstantial. Nor did the trial court abuse its discretion in denying Darks permission to introduce evidence of alleged pretaking trespass.

The judgment of the district court is affirmed.

APPENDIX D

FILED
SUPREME COURT
STATE OF OKLAHOMA
NOV 21 1977
ROSS N. LILLARD, JR., Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Maxwell Darks, Appellant,	)	
	)	
vs	)	No. 48,054
	)	No. 48,055 Consolidated as
Transok Pipe Line Co.,	)	No. 48,056 No. 48,054
an Oklahoma Corporation,	)	
	)	
Appellee	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

I. Notice is hereby given that Maxwell Darks, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of November 16, 1977, affirming the Order of the Court of Appeals (Division 1) entered on October 4, 1976).

II. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

III. The Clerk will please prepare a transcript of the record in this case for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) All pleadings and orders from the Hughes County District Court, Court of Appeals (Division 1), and the Supreme Court of Oklahoma, that were before the court and considered by the Supreme Court of Oklahoma in the above cases consolidated under No. 48,054.

(b) All transcripts of oral argument from the Hughes County District Court before the Supreme Court of Oklahoma.

(c) All exhibits, same being the transcripts of proceedings in case No. 35,868, before the Corporation Commission of Oklahoma as follows:

Exhibit 1—Transcript of testimony on January 16, 1973.

Exhibit 2—Transcript of pleadings and order of March 5, 1973.

Exhibit 3—Transcript of oral argument of June 25, 1973.

Exhibit 4—Transcript of testimony of July 2, 1973.

Exhibit 5—Transcript of oral argument of July 19, 1973.

IV. The following substantial federal questions are presented by this appeal requiring plenary consideration, to-wit:

(1) Lack of jurisdiction because of Certificate and Order No. 96,291, in Corporation Commission Case No. 35,868, issued on March 5, 1973, is void ab initio and void on its face. The certificate does not meet the requirements of 52 O.S. § 36.3(b) and § 36.4(b).

(2) Appellee was permitted to take the land of Appellant under an irrebuttable presumption of his right to do so. There was no meaningful hearing at a meaningful time to determine the Necessity for the Taking prior to entry in condemnation nor has there been an evidentiary hearing after entry in condemnation. Such hearing requested prior to time of authorized entry under 66 O.S. § 53.

(3) The verified request for restraining order and injunction to stop the trespass and resulting damages filed on June 11, 1973, and the request for an injunction filed on March 1, 1974, to halt trespass and damages was ignored by

the court without an evidentiary hearing. Such request was overruled without allowing Appellant to elicit testimony from Appellee or allowing Appellant to present testimony prior to the order of November 21, 1974.

(4) Appellant was restrained instanter—without hearing—on October 24, 1974, from using all necessary "self help" against Appellee to stop Appellee's unlawful invasion, trespass and confiscation of Appellant's land.

(5) Appellant requested an evidentiary hearing where testimony could be elicited from commissioners to determine the method used to appraise the property taken and to determine what was taken. Such request enjoined in the Order of October 31, 1973, and overruled in the order of November 21, 1974.

Said rulings invalid by reason of repugnancy to due process and equal protection of the law under Amendments V and XIV, Constitution of the United States and said rulings further constituting denial of other federal rights whether or not capable of being brought here by appeal.

s/ Maxwell Darks
Maxwell Darks, Pro Se
313 S.W. 103
Oklahoma City, Okla. 73139
Office 231-4451
Home 794-0657

Proof of Service

I, H. Maxwell Darks, Attorney, deposes and say that on the 21st day of November, 1977, I served a copy of the foregoing Notice of Appeal on the Honorable Ralph B. Hodges, Chief Justice, Supreme Court of Oklahoma, Capitol Bldg., Oklahoma City, Oklahoma; Mr. Larry Derryberry, Attorney General, State of Oklahoma, Counsel for the Supreme Court of Oklahoma, Capitol Bldg., Oklahoma City, Oklahoma; and Mr. Kenneth East Counsel for Transok Pipe Line

Co., P.O. Box 201, Tulsa, Oklahoma, 74102, by mailing a copy of this notice by first class mail to the individuals at the addresses shown above.

s/ H. Maxwell Darks

State of Oklahoma
County of Oklahoma

On the 21st day of Nov., 1977, personally appeared Maxwell Darks and he subscribed and swore in my presence that the foregoing Proof of Service was true and correct.

My commission expires 8-3-78 s/ Ruth Burgen

[Seal]

FILED
SUPREME COURT
STATE OF OKLAHOMA
NOV 28 1977
ROSS N. LILLARD, JR., Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Maxwell Darks, Appellant,	)	
	)	
vs	)	No. 48,054
	)	No. 48,055 Consolidated as
Transok Pipe Line Co.,	)	No. 48,056 No. 48,054
an Oklahoma Corporation,	)	
Appellee	)	

* * * * * *

AMENDED
NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Comes now Maxwell Darks, Appellant, and for his amended Notice of Appeal to the Supreme Court of the United States adopts herein parts I, II, III, and IV from the original Notice of Appeal filed in this court on November 21, 1977, and amends the last paragraph of the original notice to read as follows, to-wit:

Said rulings invalid by reason of repugnancy to due process and equal protection of the law under Art. 2, § 7 and § 24. Oklahoma Constitution, Amendment V and Amendment XIV, Sec. 1, Constitution of the United States and said rulings further constituting denial of other federal rights whether capable of being brought here by appeal.

s/ H. Maxwell Darks
H. Maxwell Darks, pro se
313 S.W. 103
Oklahoma City, Okla. 73139
Office 231-4451
Home 794-0657

Proof of Service

I, H. Maxwell Darks, Attorney, deposes and say that on the 28th day of November, 1977, I served a copy of the foregoing Notice of Appeal on the Honorable Ralph B. Hodges, Chief Justice, Supreme Court of Oklahoma, Capitol Bldg., Oklahoma City, Oklahoma; Mr. Larry Derryberry, Attorney General, State of Oklahoma, Counsel for the Supreme Court of Oklahoma, Capitol Bldg., Oklahoma City, Oklahoma; and Mr. Kenneth East, Counsel for Transok Pipe Line Co., P.O. Box 201, Tulsa, Okla., 74102, by mailing a copy of this notice by first class mail to the individuals at the address shown above.

s/ H. Maxwell Darks
H. Maxwell Darks

State of Oklahoma
County of Oklahoma

On this 28th day of November, 1977, personally appeared H. Maxwell Darks and he subscribed and swore in my presence that the foregoing Proof of Service was true and correct.

My commission expires Nov. 4, 1978 s/ Lanita Wright

[Seal]